~~502~~
503

SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

JULY 15, 1989 MEETING

INDEX

BEFORE THE

SUPREME COURT ADVISORY COMMITTEE

AUSTIN, TEXAS

SUPREME COURT ADVISORY COMMITTEE

BE IT REMEMBERED that the above entitled matter came on for hearing on the 15th day of July, 1989, beginning at 8:30 o'clock a.m. at the Texas Law Center, Austin, Texas, and the following meeting was reported by ANNA L. RENKEN, Certified Shorthand Reporter and Notary Public in and for Travis County, Texas.

ORIGINAL

ANNA RENKEN & ASSOCIATES
CERTIFIED COURT REPORTING
3404 GUADALUPE • AUSTIN, TEXAS 78705 • 512/452-0009

APPEARANCES

Mr. Gilbert T. Adams, Jr.
Law Offices of Gilbert T. Adams
1855 Calder Avenue
Beaumont, Texas 77701-1619

Mr. Pat Beard
Beard & Kultgen
P.O. Box 21117
Waco, Texas 76702-1117

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Mr. Thomas Black
Martin, Shannon & Drought
InterFirst Plaza, 25th Floor
300 Convent Street
San Antonio, Texas 78205

Professor Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston, Texas 77004

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
Highland Park Place, 18th Floor
4514 Cole Avenue
Dallas, Texas 75205

Professor Elaine Carlson
South Texas College of Law
1303 San Jacinto, Suite 224
Houston, Texas 77002

Judge Solomon Casseb, Jr.
Casseb & Pearl, Inc.
127 East Travis Street
San Antonio, Texas 78205

Judge Sam Houston Clinton
Court of Criminal Appeals
Supreme Court Building
Austin, Texas 78701

Mr. John E. Collins
3500 Oak Lawn Avenue
Suite 2200
Dallas, Texas 75219-4343

Mr. Tom H. Davis
Byrd, Davis & Eisenberg
P.O. Box 4917
Austin, Texas 78765

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Professor J. Hadley Edgar
Texas Tech University School of Law
Lubbock, Texas 79409

Mr. Kenneth D. Fuller
Koons, Rasor, Fuller & McCurley
Suite 300
2311 Cedar Springs Road
Dallas, Texas 75201

Mr. Michael A. Hatchell
Ramey, Flock, Hutchins, Jeffus,
Crawford & Harper
P.O. Box 629
Tyler, Texas 75710-0629

Mr. Charles F. Herring
Small, Craig & Werkenthin
P.O. Box 2023
Austin, Texas 78768

Mr. Vester T. Hughes. Jr.
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Mr. Franklin Jones, Jr.
Jones, Jones, Baldwin, Curry & Roth, Inc.
P.O. Drawer 1249
Marshall, Texas 75670

Mr. Gilbert I. Low
Orgain, Bell & Tucker
Beaumont Savings Building
470 Orleans Street
Beaumont, Texas 77701

Chief Justice Austin McCloud
11th Court of Appeals
100 W. Main Street
Eastland, Texas 76448

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Building
Austin, Texas 78701-2494

Mr. Russell McMains
McMains & Constant
P.O. Box 2846
Corpus Christi, Texas 78403

Mr. Charles Morris
Morris, Craven & Sulak
600 Congress Avenue
Suite 2350
Austin, Texas 78701-3234

Mr. John M. O'Quinn
O'Quinn & Associates
3200 Texas Commerce Tower
Houston, Texas 77002

Judge Stan Pemberton
169th District Court
Courthouse
Main & Central Street
Belton, Texas 76513

Mr. Tom L. Ragland
Clark, Gorin, Ragland & Mangrum
P.O. Box 239
Waco, Texas 76703

Mr. Harry M. Reasoner
Vinson & Elkins
3300 First City Tower
Houston, Texas 77002-6760

Honorable Raul Rivera
Judge, 288th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Mr. Luther H. Soules, III
Soules, Reed & Butts
800 Milam Building
San Antonio, Texas 78205

Mr. Broadus A. Spivey
Spivey, Kelly & Knisely
P.O. Box 2011
Austin, Texas 78768-2011

Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

Mr. Sam D. Sparks
P.O. Drawer 1271
San Angelo, Texas 76902-1271

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Honorable Nathan Hecht
Justice, Supreme Court of Texas
P.O. Box 12248
Capitol Station
Austin, Texas 78767

Judge David Peeples
COAJ Chair

R. Doak Bishop - COAREC Chair
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

(Saturday July 15, 1989 Hearing.)

MR. SOULES: Let's be in order, and we'll go ahead and get started. I want to thank everyone for being here on a Saturday morning. I believe we have an agenda that we can finish in a day, maybe even a short day depending on the needs of each of these suggestions for debate and maybe some changing as we go along, but I don't think there's going to be any problem getting our agenda done today.

I want to welcome the new members, Justice McCloud who is here representing the chief justices, and Justice David Peeples who is here, a new member representing the State Bar of Texas Committee on Administration of Justice, and Doak Bishop, who is here as representative of the State Bar's Rules of Evidence Committee. So welcome to you new members. We appreciate your being here to contribute today.

Our last agenda which we managed to complete in a two-day session was these materials (indicating), which ran about

1200 pages; and our agenda today which includes the suggestions, the minutes of the last meeting and the red line versions of all the rules that we're going to recommend changing is about half the size of one of those volumes. So to have done all that you did last time was really amazing and a great accomplishment.

I think to start with today I'd like to recognize Elaine Carlson to tell us about the local rules project, and in recognizing her I need to tell you that she has now read every published local rule in the State of Texas.

JUDGE CASSEB: She ought to really be confused.

MR. SOULES: As Mr. Casseb said, she ought to really be confused. In the local rules effort, we did gather up all of the local rules that are printed in the State of Texas, and we did that by just hounding every district clerk and local administrative judge until they either sent us their rules or told us that they had no written rules, one or the other. They either had to tell us they

didn't have them or send them to us. And Holly spent about three months in that effort. And as a matter of fact, there were 203 that have them or 201.

MS. HALFACRE: 203, I believe.

MR. SOULES: 203 counties have written local rules, and 51 do not. They were all collected in volumes that were about two -- they were actually thicker than this (indicating), two volumes thicker than this; and in a uniform numbering system some of which was done by the local administrative judges together with their judges, which is the way we preferred to have it so that we didn't get their rules in a category they weren't pleased with. But there were a lot of them that came in and we had to re-number them and get them into a uniform numbering system that's now mandated by the February 4, 1987, Supreme Court Administrative Order and the various rules of the regional judges.

But we've made a lot of progress. Elaine then volunteered for an enormous task, and that was to read all those

rules as they are numbered in the uniform numbering system so that all the rules on a certain number would be collected together, to read all of those and to eliminate duplications and inconsistencies with the Texas Rules of Civil Procedure, which the local rules, of course, are not supposed to have any inconsistencies, and she has done that and sent that work product back to my office.

So I can't -- I don't know how you can recognize that size of piece of work other than just to say a "thank you." That's the biggest word I can come up with, Elaine. That's an amazing piece of work, and we are forever indebted to you for that. That advances this project certainly beyond what anyone ever thought it would get to, and maybe we're on the right track now.

MR. DAVIS: Are you checking that over now to make sure it's right?

MR. SOULES: Tom, if Elaine Carlson did a job, would you re-check it? Of course not.

MR. DAVIS: That and other reasons.

MR. SOULES: But if you would like to form a committee and be its chair. So, Elaine, give us --

MR. DAVIS: I thought the chairman ought to check it. That's all.

MR. SOULES: Tell us about your experience. I'm sure we are really -- at least I know I am and I think the rest of the committee are very curious to hear what you found in that collection of rules and your view of it and your view of how the project can go forward from here.

PROFESSOR CARLSON: One thing I concluded was that I think we found the solution to repeat felony crimes and we should make convicted felons read the local rules. But beyond that, it was a very interesting project and gave insight into a lot of regional variations.

There are some problems that remain, and as Luke suggested, what we've done is gone through and try to eliminate what were duplicating one another, to make the time

periods consistent with the Rules of Civil Procedure, and third, to eliminate those rules that are in conflict with the Rules of Civil Procedure. I have set forth a very extensive letter to Luke. I have tried to do my best to edit any conflict, to amend a conflict of a given rule, but I think what we have left is still a pretty bulky project. I don't know how many pages it's going to come down to. I suspect it will have to be, Luke, a fifteen some hundred pages, probably still probably a thousand-page effort my best guess. And we still have a problem that I think we need another run-through for inconsistencies with substantive law. I tried to do it as I went through the phenominal project.

For example, in the Family Law area local rules that said doesn't comply with certain requirements your divorce decree could be dismissed with prejudice. I suspect the State of Texas can't require people to stay married because the lawyer didn't comply with the local rules. There were a few of those blatant errors that I caught going through, but we need another run through.

The rules have not been amended at all to conform with what might come out of the work product from 1989 in this committee. So that's another run-through on those rules that the Supreme Court promulgates this year effective 1990. They'll have to, you know, cull through some of the local rules as well. And some of the local rules in counties don't have any local rules as Luke suggested, and the major area of concern I have left is whether or not the State of Texas Supreme Court by the Regional Rules of Judicial Administration mean to suggest that courts do have to have some local rules on certain subjects like docketing procedures and trial settings. So whether that conclusion is correct remains to be seen. But other than that, the project is coming along, and we've got one pass-through and suspect probably to have several passes through before it's finished.

MR. SOULES: Does anyone have questions or comments for Elaine? Thank you, Elaine.

Next on page -- beginning

on page two are the minutes of our last meeting, and I mailed these out, and I appreciate the responses I got by phone and by letter, and I attempted to make corrections responsive to those suggested corrections, and I don't know if I got them all made, but we tried to. And if there are others of you that may now have suggestions for the minutes, I'd like to hear corrections to the minutes that appear on pages one through ten, if there are any corrections. If there are no corrections, those in favor of approval of the minutes as presented here, say "Aye."

COMMITTEE MEMBERS: Aye.

MR. SOULES: Opposed?

COMMITTEE MEMBERS: (No response.)

MR. SOULES: If someone finds an inaccuracy in these during the day, please let me know, because we still can correct them before they're sent to the Supreme Court.

Next on page 12, the Senate Bill 874 was a bill that passed both houses of the legislature. When I finally

caught on to the bill, it was in the House on the third reading on the local and consent calendar, and had already passed the Senate unanimously. There was no inconsistency with the House version, so there wasn't going to be a conference committee, and in order to stop the bill we would have had to have a two-thirds no vote on third reading on the local and consent calender with no one having made an objection yet.

So obviously that wasn't doable in spite of the fact that a number of San Antonio legislators indicated that they would help but for the status of the bill, and they did help on the Rule 13, which I'll talk about in just a minute. The Chief Justice and Justice Hecht and many of you -- I know John O'Quinn wrote a letter to the governor, and Tony Sadberry and several others to veto that bill, and the governor did veto it. But SB874 essentially said that the Supreme Court of Texas couldn't make rules inconsistent with the statutes, and put the legislature back into the rule-making business; whenever they decided they wanted to change a practice, they

could pass a statute and that's the end of it.

Well, that got vetoed. And if we watch for it next time coming back, if it does come back, and start out early enough, I think we can probably keep it from getting as far as it did, because just as a matter of reason it shouldn't. That type of legislation I think is not necessary. I believe maybe we'll have some support in the legislature, because on page 12 is a letter that I got from Senator Glasgow. I went up and testified on SB1013, which was a statute for frivolous pleadings and suits, and ate crow for about an hour, and just because probably I did not communicate as well with the legislature as I should have after we passed Rule 13 to cover all cases and not just tort cases, and with this SB1013 it got stopped and never did pass out of House Committee or the Senate Committe, I believe. I think it never got out of either committee.

But the important thing, I think, in this letter from Senator Glasgow talking about that hearing and the letter that

was submitted and then this paragraph, "As we discussed during the hearing, it appears that part of the solution to this question regarding sanctions for frivolous lawsuits would be to have better lines of communication opened up between the legislature and the Supreme Court." I think that's part of our job, maybe largely our job, especially on rule-making.

And Senator Glasgow and I really talked about better communications on a broader basis than just frivolous lawsuits, so I think perhaps maybe we should resolve here to communicate as fully as we possibly can with the Senate and the House in order to keep them advised of the efforts that we are making towards the improvement of the administration of justice and the fact that we want to be cooperative and work in cooperation with the legislature to improve Texas administration of justice in all ways.

Do we have a motion to so resolve?

PROFESSOR EDGAR: So moved.

MR. SOULES: Seconded?

JUDGE CASSEB: Seconded.

MR. SOULES: All in favor say "Aye."

COMMITTEE MEMBERS: Aye.

MR. SOULES: That's unanimous. I'll prepare a resolution of this committee and submit it to Senator Glasgow, who of course is the chair of the Senate Jurisprudence Committee.

There were then other letters back about our legislative efforts, and I think -- I put these here just to show that there is legislative response. So I will try to do a better job about picking up early on legislation of interest to us in the next session and try to get that information to you as early as I possibly can for any action that we may chose.

Justice Hecht, good morning to you, sir.

JUSTICE HECHT: Good morning.

MR. SOULES: Do you have remarks for the committee this morning?

JUSTICE HECHT: No. Once again, we appreciate all the good work since the last meeting and thank you for coming.

MR. SOULES: Next is a red line version of the rules that we did last time. That starts on page 17 and concludes at page -- it looks like 120. I did get written input from several of you, and I made the changes that I felt were -- there were some new suggestions, some thoughts for some maybe some additions to what we had done, and those I put in the new materials beginning at 121 and going back into the rest of the book for action today. The suggestions that I got back which were corrective to my original red-line work product, I made or tried to make all of those.

Does anyone see anything in these pages from 17 to 120 now that's inconsistent with the resolutions of the committee in our last session?

MR. TINDALL: Luke, I have one. I think it's really just a cleanup. On page 46 when we added the pychologist, Rule 167(a) --

MR. SOULES: Right.

MR. TINDALL: -- I think. On the next page, subpart two of that rule needs to be changed also. There are two references to physicians in the existing rule where we need to also across-reference to psychologists.

MR. SOULES: All right. We need a rule book to look at that, don't we? That's not on this. 166(a).

MR. TINDALL: 167(b)(2). There are two references about physicians. It needs to say "or psychologists."

MR. SOULES: 167. That's Rule 167(a), paragraph (b) parenthesis (2).

MR. TINDALL: Parentheses (2).

MR. SOULES: Paragraph (2).

MR. SADBERRY: Add psychologist.

MR. TINDALL: It talks about the report of an examining physician or the taking of a deposition of a physician in both cases.

MR. SOULES: After the words physician appearing twice in the last sentence we should add "or psychologist"?

MR. TINDALL: Right.

MR. SOULES: All right. If there's no objection, that will be accepted as a corrective -- correction to the rule as written and will go in to the Supreme Court with those two additions. Being no objection, that stands done unanimously. Any others?

JUSTICE MCCLOUD: I think you ought to make a talk about that.

MR. SOULES: That's going to be on the agenda.

JUSTICE MCCLOUD: Okay.

MR. SOULES: We've got that redlined, Judge McCloud.

JUSTICE MCCLOUD: That's good.

MR. SOULES: Okay. There being no further comment, these then will be submitted to the Supreme Court as written. Again, however, if any of you see matters in these rules that need correction, if you'll let me know during the day today or as soon as

possible, I will make them conform and as soon as possible and send the Supreme Court a corrected version. I know there's nothing about the timing here intended to stop your helping me get these right if they're not completely right now.

Okay. Well, that gets us to today's business, I believe. The legislature, I think, passed a resolution. I'm told they passed a resolution. I haven't really seen it -- that says that the Supreme Court is to promulgate guidelines or rules of some kind to -- regarding sealed records, when records can be sealed and when they cannot.

JUSTICE HECHT: It's a statute, right.

MR. SOULES: To conform with the statute.

PROFESSOR EDGAR: What page are you on?

MR. SOULES: This is page 121. Is Ken Fuller here today?

MR. FULLER: Yes.

MR. SOULES: Ken, sure. There you are. Good. So we need to respond

to that and get that done as soon as we can, but I'm somewhat impressed that that is going to take a while to really resolve the differences of view. John MacElhany, who is with Locke, Purnell in Dallas and they represent the Dallas Morning News, has sent in an extensive work.

From the Donnybrook in Dallas because -- I forwarded it because someone contacted me. It doesn't necessarily reflect my view. It's going to be really volatile. Reserve time to hear from them.

JUSTICE HECHT: The statute says, "The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case including settlement should be sealed."

MR. SOULES: Okay. So we've got a mandate from the legislature, and I'm satisfied, Justice Hecht, that that has been assigned to our committee for resolution. Is that right.

JUSTICE HECHT: That's right.

MR. SOULES: "That'sa right," he says. But there has been apparently a lot of negotiation between the lawyers at Locke Purnell, lawyers for the press and the lawyers for the District Clerk of Dallas County on trying to set out some guidelines for Dallas County; and at least in one case it seems that they reached an agreement.

MR. FULLER: Uh-huh.

MR. SOULES: And this is McElhaney's work product that he sent to me. He called me and has submitted this and apparently has a lot more. And the letter from McElhaney is at page 402 of these materials.

MR. FULLER: 402?

MR. SOULES: 402, right. It came in kind of late, so we stuck it to the back. He gives a lot of parameters, so there's a lot of thought process gone into this already. We won't be just beginning with no concepts at all. Okay. That by way of asking for volunteers, persons who might be interested in this project to where there is

someone who will chair or be willing to co-chair the project as an ad hoc subcommittee chair? Is there anyone?

MR. FULLER: I'll serve on it. I don't want to chair it. I don't have time for that.

JUDGE CASSEB: If Judge Peeples will serve on it, I will, too.

MR. SOULES: Lefty, will you chair it?

MR. MORRIS: Yes.

MR. SOULES: I think it might be helpful for you and maybe Charlie, someone who has good interaction with the legislature, to chair this so that if there's criticism in the legislature next time, of whatever work product we come up with, there will be some rapport from the work group that can go over and tell the people what we did. And there's obviously going to be an open ear to everyone who wants input into this that we did hear and we resolved it as fairly as we could to everybody and give the background. And that's why I think --

MR. HERRING: I'll serve

on it as long as Lefty chairs it, so that if there is criticism from the legislature, it's directed to him.

MR. MORRIS: I'll be vice chair and blame him.

MR. SOULES: Lefty, would you share the chair with Charlie? Charlie would you share the chair with Lefty?

MR. MORRIS: However you want to do it.

MR. SOULES: Okay. Lefty and Charles Herring will be the co-chairs, and Ken Fuller; and Judge Casseb volunteered Judge Peeples. Is that all right, Judge Peeples?

JUDGE PEEPLES: I guess so.

MR. SOULES: And your having accepted, just as a suggestion that captures him, too, because he volunteered conditionally.

JUDGE CASSEB: That's okay.

MR. SOULES: Okay. Are there any other volunteers? Anybody else sufficiently interested in this to want to

work on it? Okay. Let see if we've got -- Harry, is there any interest in this in Harris County?

MR. TINDALL: There is just no written rule on it. No, I haven't seen a lot. I was in the legislature when all that was presented, and evidently it grew out of a case in San Antonio where a member of the clergy was charged with sex abuse or something and the records were all sealed. It was anti-sealing sentiment is what was expressed in the legislature.

MR. SOULES: Okay. All right. We will start then with those five. And if you, Lefty or Charlie feel you need additional help, call me and I'll see if I can get additional people on board; and if you would, keep me advised, because I may get telephone calls, too. I'll just be on your committee as well. If that's okay with you, I'll help. I'll serve as a subcommittee person.

MR. MORRIS: (Nods affirmatively.)

MR. SOULES: Okay. Whose

bill is that, Judge? Do you know?

JUSTICE HECHT: That's -- I don't have it. House Bill 1637.

MR. TINDALL: Orlando Garcia.

MR. SOULES: Orlando Garcia. I will advise Orlando that we have appointed a committee to comply with that statute. Any objection to my so doing? Okay.

I guess then in concluding that, Lefty and Charlie, I think that I don't see any reason not to include on the committee for purposes of the committee work someone like McElhaney, who is not on this committee and his counterpart, whoever that may be in the original work as it develops into what we propose, because they've done so much work on it already. He did ask to be heard -- to be able to make a presentation to this committee whenever we act to adopt those rules, and I told him that was fine. But does anyone see any reason not to include someone like McElhaney, who is a lawyer for the press and then some counterpart of his of mutual stature

or even others as well on the committee in developing these rules or public members, as it were, to help us work it out?

MR. MORRIS: I think it would be good, Luke. I think he should be there and feel like he's got input and be heard and we should really consider everything he has to say. I don't see how it can hurt.

MR. SOULES: Will you contact him and tell him the committee as a whole invites him to participate at a subcommittee level?

MR. MORRIS: Yes.

MR. SOULES: And get from him or Ken Fuller or someone a counterpart of equal standing, equivalent standing?

MR. MORRIS: What do you mean by counterpart?

MR. SOULES: Someone who wants to unseal records, see. McElhaney wants to -- no, unsealed -- I'm sorry. He wants them unsealed. Find someone who has an interest in sealing them. I don't know exactly who that is.

MR. MORRIS: I don't know

what group that would be, unless you're talking about adoption agencies or something.

MR. SOULES: Well, it may be. I don't know who it would. But there was a lot of resistance to --

MR. FULLER: Criminal defense lawyers may have an interest.

MR. SOULES: Might be criminal defense or some family lawyer in big estates.

MR. FULLER: I'll qualify in the family law area on certain kinds of cases. I really do think someone on the criminal defense side should have some input.

MR. MORRIS: All right. Let's get it.

JUSTICE HECHT: Pereeny has got a letter in here.

MR. SOULES: B. Pereeny might be the right person.

MR. MORRIS: What if I just contact the president of the criminal defense bar and ask them to appoint someone to work on the subcommittee with us, Luke?

MR. SOULES: Okay. If

you'll let me know how that works out --

MR. MORRIS: I'll do it.

MR. SOULES: I'll write a letter to them as well as you and welcome them to the board.

MR. MORRIS: All right.

MR. SOULES: Okay. Next, I guess is just to discuss whether or not there ought to be an effort in the upcoming interim to reorganize the Rules of Appellate Procedure. This was Sarah's suggestion. There appear to be some rules that are not really where they ought to be. And Rusty, is Mike Hatchell here today?

MR. MCMAINS: Mike was unable to come today.

MR. SOULES: Rusty, have you had a chance to --

MR. MCMAINS: We need to talk about the request for reorganization in light of the resolution by the Supreme Court. And Justice Hecht, I'm trying to find out. This resolution to consider the Federal Rules that the Supreme Court passed, does it apply to the appellate rules as well? I really

didn't -- I had a chance to talk to Justice Phillips about that in Austin at the bar conference or San Antonio bar conference, but only briefly when I met.

JUSTICE HECHT: Have you seen our letter?

MR. MCMAINS: I have not seen it.

JUSTICE HECHT: Well, if I can take just a second. Somebody in the House sponsored a resolution at the special session that said basically -- I don't think I have it here. But by a certain date in the future, 1991 or 1992, the Supreme Court would make every effort to move as much as possible toward the Federal Rules of Civil Procedure. Representative Uher introduced that resolution, and he and the chairman of the committee, Patricia Hill, called the chief and said they wanted a statement from the court, yes or no. So we sent them over about a six-page letter signed by all of us that said "maybe."

And we said we were already studying that and we had been studying

it for a long time and there were a whole lot of problems with it. It wasn't just as simple as saying, "Do it," and certainly we were interested in any positive suggestions. And we appreciated their input, and if they had any further suggestions on how to do it, we certainly would put them on the committee or do whatever they wanted to do. But otherwise, we were doing the best we could and we could certainly get back with them. And that resolution on the first reading passed, about 90 or so to a few votes against.

On the second reading it failed, about 120, 130 votes to a few against -- to a few for. And I'm not not sure what happened to it on the third reading. But I think it's fair to say that the sentiment in the House of Representatives is mixed on that subject. And all the -- the only expression that we have made is that organizationally and for simplicity and trying to unify the practice in all the courts of Texas, we're certainly going to look at that and see what can be done in that area, but it's not just as simple as up and adopting the Federal Rules.

So really we have not made a resolution to take any specific action other than continue looking at it.

MR. MCMAINS: Okay.

PROFESSOR BLAKELY: Luke, without any expertise on this, let me suggest that the Appellate Rules have only been in effect, what, six years, something like that. We're lined up with the criminal side. If we reorganize the Civil Appellate Rules, you have to -- we're out of whack with the criminal, or the criminal has got to do something. If the only real motivation here, reason for reorganization is that we've got a few Appellate Rules that don't seem to be in the right place, could we just tolerate that? Particularly since, if we do get into the business of the Rules of Civil Procedure, reorganizing that, that's going to be a monumental task, it seems to me. Working on the appellate rules would have surely caused the plate to overflow. Just a sentiment on that side of this case.

MR. BEARD: I second it.

MR. SOULES: Bill Dorsaneo

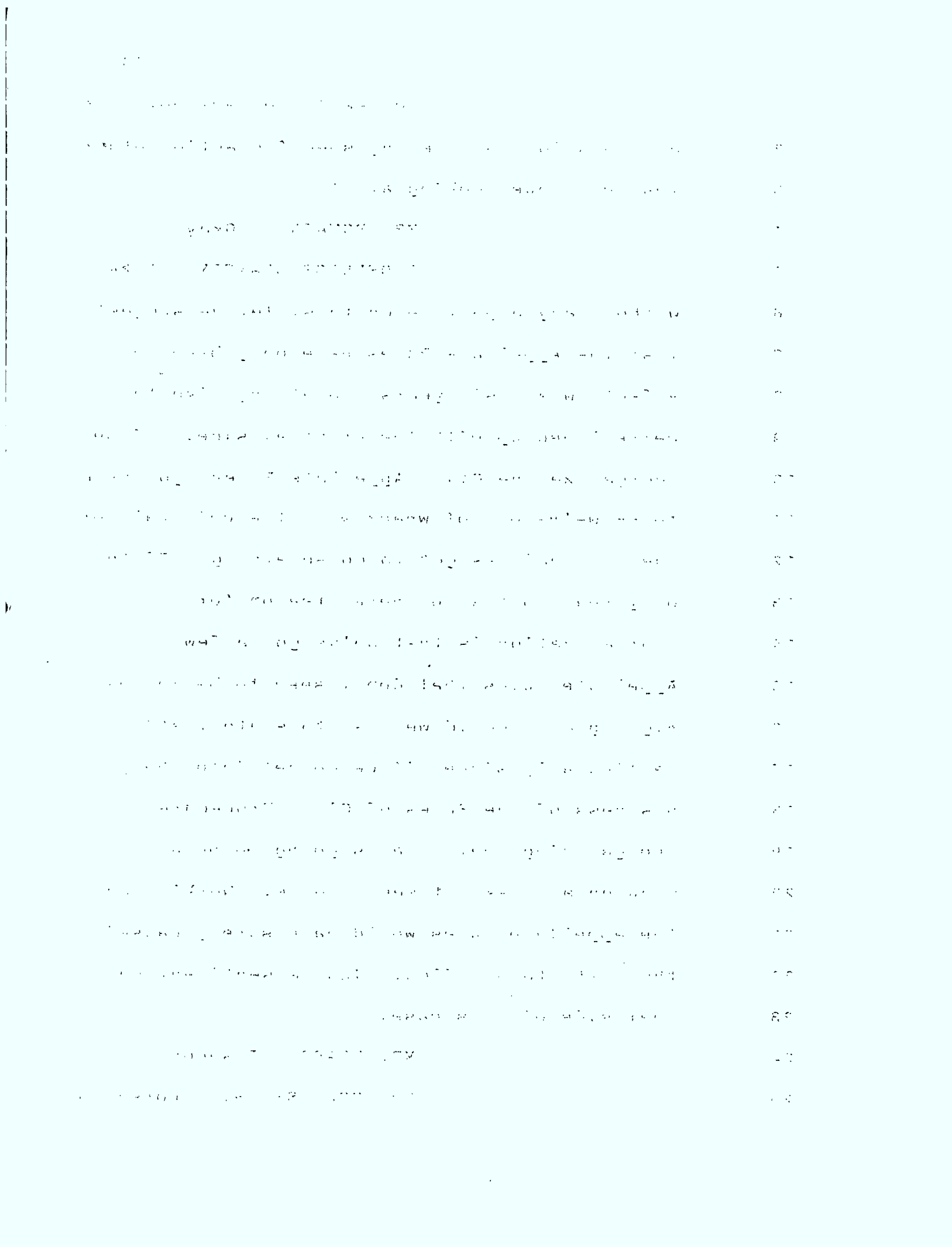
So really we have not made a resolution to take any specific action other than continue looking at it.

MR. MCMAINS: Okay.

PROFESSOR BLAKELY: Luke, without any expertise on this, let me suggest that the Appellate Rules have only been in effect, what, six years, something like that. We're lined up with the criminal side. If we reorganize the Civil Appellate Rules, you have to -- we're out of whack with the criminal, or the criminal has got to do something. If the only real motivation here, reason for reorganization is that we've got a few Appellate Rules that don't seem to be in the right place, could we just tolerate that? Particularly since, if we do get into the business of the Rules of Civil Procedure, reorganizing that, that's going to be a monumental task, it seems to me. Working on the appellate rules would have surely caused the plate to overflow. Just a sentiment on that side of this case.

MR. BEARD: I second it.

MR. SOULES: Bill Dorsaneo



has his hand up. Did you have a comment?

PROFESSOR DORSANEO: I had one or two comments. It is true that as a result of the fact that it was relatively late in the game that the direction was given to actually include the Supreme Court Rules into the work product that we were working on, and that the organization is not exactly what it probably would have been had we known what the overall scope was going to be from the outset of the project.

Nonetheless, I don't see any large problems with the current organization that have to do with an overall renumbering. I think renumbering could improve things. And this reorganization as suggested in the June 13, 1989, memorandum beginning on page 128 prepared by Sarah Duncan does make a good deal of sense.

But I end up concluding that it probably is not something that really needs to be done right now. The last comment in terms of how our Appellate Rules match up with the Federal Rules of Appellate Procedure, we did look carefully for a model that we

could use in having an organized set of appellate rules. And the Federal Rules of Appellate Procedure were in general terms used as a model, and you would see a lot of organizational similarities if you went and looked. Some things were decided to do differently from the Federal Rules: Put the general rules, for example, at the beginning rather than at the end as a matter of taste. But in many ways as far as our rule book is concerned except for the Rules of Civil Evidence, the Rules of Appellate Procedure are more likely to be organized like the federal counterpart than are Rules of Civil Procedure.

The bottom line, I kind of tend to agree that a major renumbering would not be something that would be worthwhile now for reasons that have been expressed, and also because I don't think there really is any real problem or any disorganization. It's just not exactly in the order that we would have followed had we known at the beginning what the scope of the project was going to end up being.

Let me make one other comment. From the standpoint of -- and I don't know whether this is meaningful, but I'll put it on the table. There is a lot of commentary written about rules that's published and sold to lawyers, and a numbering scheme change requires it to be done all over again. That is from the standpoint of booksellers not an undesireable thing to occur, but it's not probably a very good thing for lawyers unless we are really accomplishing something by a new numbering scheme. Texas lawyers have experienced a renumbering of everything in the past several years, and it has created a lot of problems up and down the line, and I have resistance to renumbering as an overall proposition on that basis alone.

MR. SOULES: Tom.

MR. DAVIS: Do you have any idea how far back the files or records of the committee goes? Back in early -- I want to say 1970 -- you know, it could have been in that area -- I chaired a five-person subcommittee that recommended that we adopt the Federal Rules of Discovery and only

discovery, and with the help of Gus Hodges we redrafted the Texas Rules in line with that and numbered them. Now, whether that -- if that document still exists somewhere back in the archives or if it would be of any help, at least at that time we thought that we had it worded and numbered to fit.

Of course, lots has happened since them. It may not be of any value. If it could be found, it might be a good starting point.

MR. SOULES: Let me just get a consensus. Is there a consensus to leave the TRAP as presently numbered, at least for the time being? Is that the consensus of the committee? Is anyone opposed to that?

ADVISORY COMMITEE: (No response.)

MR. SOULES: We will leave them as numbered presently and maybe carry this suggestion. I do think that we might carry this suggestion, because if we reorganize the Rules of Civil Procedure into the Federal Rules of Civil Procedure format, there's going to be so much renumbering in

that that a little renumbering in the TRAP rules isn't going to make any difference. It's just going to be carried with the rest, and everybody in the State of Texas is going to be living with renumbering. So suddenly there's going to be enormous renumbering done that everybody is going to have to adjust to. A little flex with these rules is not going to be much more adjustment than trying to deal with the others.

So is it acceptable for the committee to carry this suggestion as sort of an appendage of the consideration whether to renumber the Rules of Civil Procedure to fit the federal format? I see heads nodding. So we will do that. And the TRAP standing subcommittee should have that in mind, if you will, please.

All right. Next, Rusty, a report on -- let's see. It's the suggestion for TRAP Rule 4.

JUSTICE HECHT: We've got Judge Clinton.

MR. SOULES: Well, maybe I've skipped something. On page 131 is --

okay, Judge. Pardon me. I certainly apologize passing that over. This comes from Judge Clinton. Judge Clinton, will you give us your position on this?

JUDGE CLINTON: I just read through those rules from pages 77 to 120; and unless I'm mistaken they've already been adopted.

MR. SOULES: Well --

JUDGE CLINTON: I simply thought that in Rule 1 where you-all were proposing that every time a case is docketed a copy of the local rules of the Court of Appeals be sent to all counsel was going to end up with district attorneys especially having stacks of them in their office and wondering what to do with them, and suggested that you just add "to who requested it." And as I have read Rule 1 back there on way back on page 77, I think that's been done.

And Rule 20, on the civil side you want to restrict briefs to 50 pages. We struggled around with that and have struggled around with that on our court for years, 50 at one time and taking it off, and

we finally decided especially in light of the number of points of error that are included in death penalty cases especially that we could live without a 50-page rule, and so we have now for some time. And therefore to carry that forward I just suggested Rule 20 begin with "In civil cases" so and so and so and so leaving it open then for us to not have a limitation, and to change the comment to that rule to allude to amicus briefs as provided for in some of these other rules, 74(h) and 136(e) that relate just to as I read your proposed amendment there, that was adopted earlier I think that was added to the comment too.

MR. SOULES: That's right. I did adjust these rules for these comments, and --

JUDGE CLINTON: We appreciate it.

MR. SOULES: -- in the edit process. And now that that's been presented by Judge Clinton, are we still of the same view that these rules go as now adjusted in keeping with his request?

ADVISORY COMMITTEE: Yes.

MR. SOULES: Okay. That is the case. Now, Judge, would it be consistent to put in those rules, to put in the comment on page 89, "To provide for maximum length in amicus briefs in civil cases"?

MR. FULLER: What page are you reading? Page 89?

MR. SOULES: Page 89. Actually, the comment then should be adjusted to say it's only in civil cases, shouldn't it?

JUDGE CLINTON: Well, I guess.

MR. SOULES: Okay. Any objection to that?

ADVISORY COMMITTEE: (No response.)

MR. SOULES: That will be done. Next is the suggested changes to TRAP Rule 4 found on page 131 of the materials. Rusty, do you have a report on that? Page 133.

MR. MCMAINS: It's actually

Judge McCloud's suggestion.

MR. SOULES: Judge McCloud, will you give us a report on this?

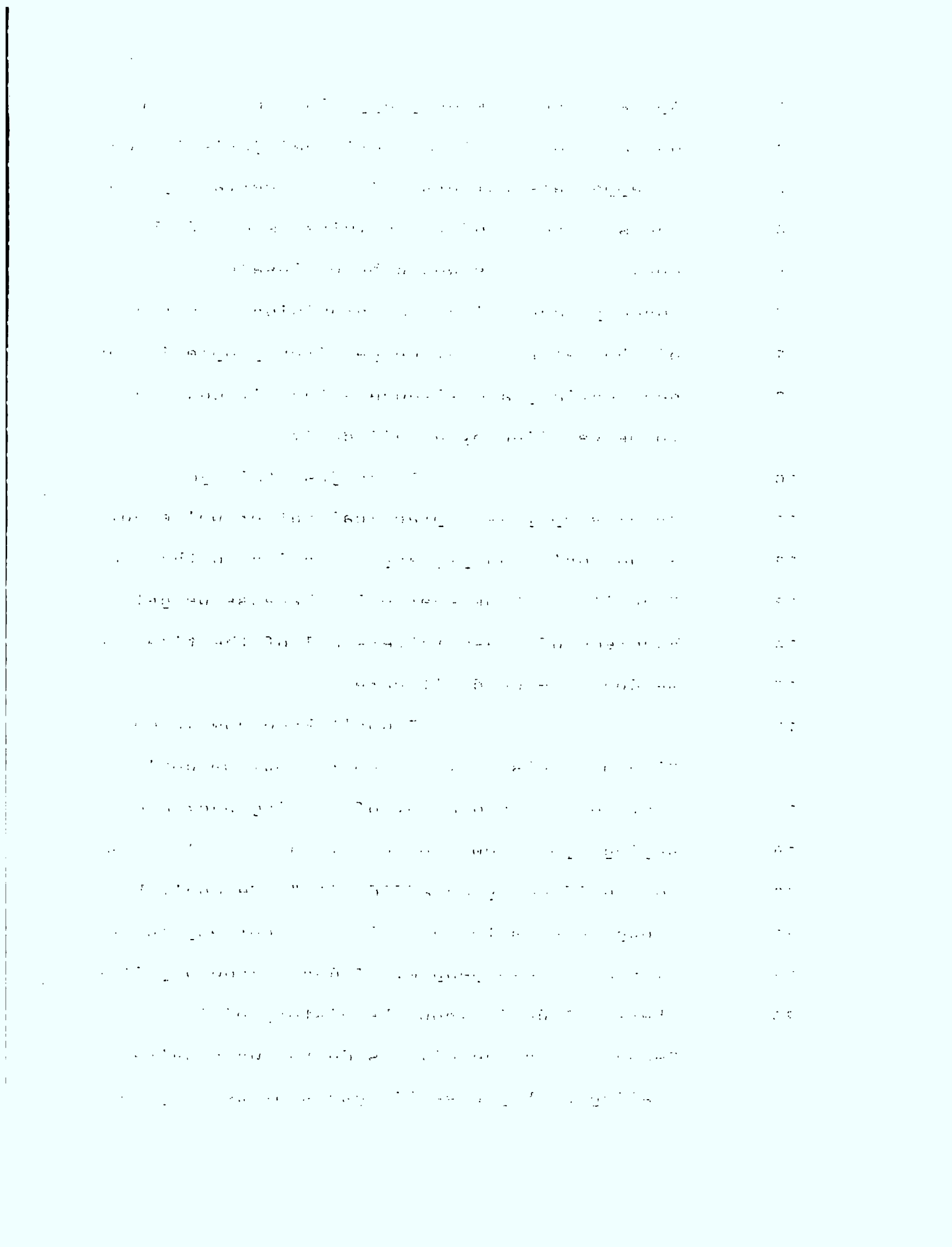
JUDGE MCCLOUD: Well, the thing that I noticed when I first read that is that the committee had elected to strike, I suppose, the last phrase up there in Paragraph A on the signing where it said, "And shall state that a copy of the paper has been delivered or mailed to each group of opposite party or their counsel." And I think that is a good suggestion, because over here -- I have forgotten -- in another one of the sub-paragraphs it seems to be taken care of. Then it says, "A party who is not represented by an attorney shall sign his brief and give his address and telephone number."

I feel that this last statement -- I mean this last sentence should be struck. The rule now provides that the statement of service on opposite parties by one who is not a licensed attorney shall be verified by affidavit. And I discussed this with, I guess, Mike Hatchell and a couple of other people, and of course on the Court of

Appeals then the only appellate court -- well, we have both civil and criminal jurisdiction in appellate matters. I think certainly from the standpoint of the criminal side of the docket that this would be wholesale noncompliance with that provision: that all of the matters that we get from people in the penitentiary and elsewhere that it would have to be verified by an affidavit.

I can just tell you I think simply as a practical matter we're not -- we don't now pay any attention to that, and I don't think we ever will, because we get hundreds of these matters all of the time and we don't -- we don't care.

I don't know how Judge Clinton feels on their court, but we don't want to get into a lot of mailing back and saying, you know, you don't have -- "This is not verified by an affidavit." We don't have enough clerks to have all this correspondence with all these people. I don't know why it's there. I don't know the history of it. Secondly, on the civil side too when we're dealing with pro se litigants we usually want



to get the matter to a conclusion, get it before the court and not be concerned about whether somebody is filing an affidavit if he is sending a copy to somebody.

The other thing that struck me is that normally when we deal with a pro se situation we like to say that they'll be treated the same as if they had an attorney. And they usually lose as a result of that statement. They frequently do. And here for some reason we have elected to place a greater burden than we normally place upon someone represented by an attorney in saying: if they're not represented by an attorney, you have got to put in any of these motions, briefs, statements, letters, whatever you're sending to the clerk has to be verified by affidavit. I just think it ought to be struck.

MR. SOULES: Those in favor say, "Aye."

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed?

ADVISORY COMMITTEE: That will be unanimuously recommended to the

Supreme Court as a rule change for TRAP 4. And with that change, did you have any other changes to TRAP 4, Judge McCloud or Rusty?

MR. MCMAINS: No.

JUDGE MCCLOUD: No.

MR. SOULES: Then those pages 133 and 134 will be substituted into the finished work product for pages 83 and 84, the only change being the change that Judge McCloud just reported on. Otherwise, the pages are the same.

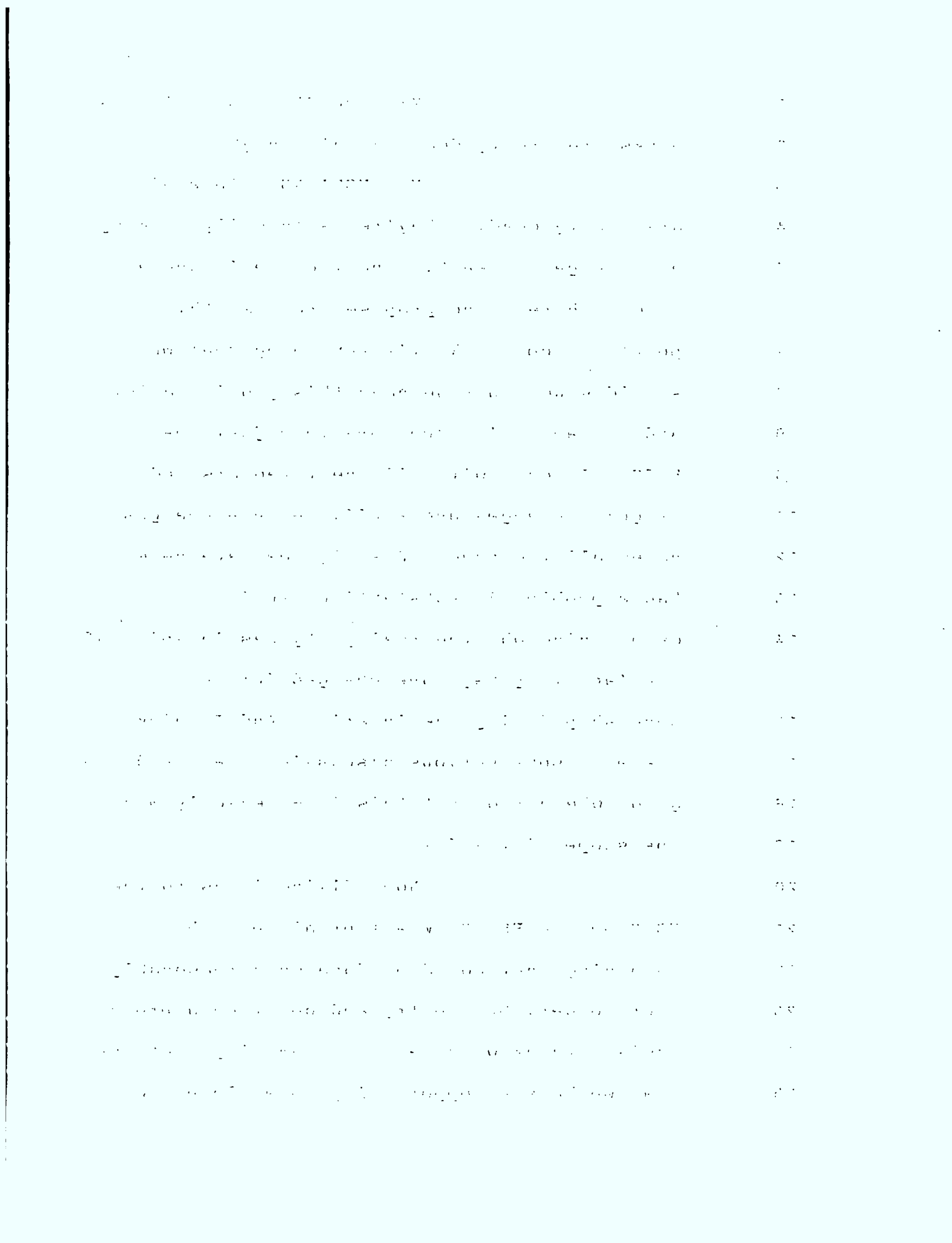
Okay. The next item is Rusty, TRAP Rule 9. That comes up on 136(a), Justice Hecht.

MR. MCMAINS: Justice Hecht has made the comment on substitution of parties, particularly in light of recent adverse banking developments in the state that sometimes it ain't the bank that's appearing, and he was talking about that the only substituting party rule that we actually have is one talking about no abatement and so on regarding the death of a party that continues, whether or not that rule might ought to be expanded.

MR. SOULES: Some of those banks are pretty dead, aren't they?

MR. MCMAINS: Some of them are pretty dead. They're technically talking about organic death. And they're financially dead. There is no proposed rule at this point. I do think it's something that we should study, but we have this problem a lot. And I mean, it's much more than just the FDIC. I mean, with all the takeovers and mergers, changes and stuff, we have changes in names all the name. Frankly, we have never had a problem in substantive law in determining who the real party was in spite of the fact they may have changed form or ownership during the interim. And I think there is some serious discussion that needs to go on whether or not this is -- exactly what the scope of the fix is.

Now, fixing it as to the FDIC or the FSLIC, whatever alone I think is something that could be done on a reasonably short order, but to try and do it on a broad basis I think we have a lot more implications than we have an opportunity to explore and



certainly before getting into a rule by 1990. And so I'm not in essence recommending that we change anything for the 1990 rules. I do think we need to study and get input from the Court whether or not they are having any problems other than in this area.

Is this the primary area, Judge?

JUSTICE HECHT: It's the only area that it's come up in.

MR. MCMAINS: Yes. We have parties change all the time in simple judgments. They just kind of show up differently.

JUSTICE HECHT: Yeah. But a lot of times in the appellate process I just think the name doesn't change.

MR. MCMAINS: That never changes on the style. That's true.

JUSTICE HECHT: There's an old case that says -- there's an old Court of Appeals case that says, questions whether the Appellate Court has any authority to substitute parties.

MR. MCMAINS: Uh-huh.

JUSTICE HECHT: There's a Federal Rule of Appellate Procedure 43 says, "If substitution of a party in the Court of Appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedures prescribed in the preceding section," which has to do with death. And I'm really not sure anything much more -- we're thinking of anything much more extensive than that.

MR. MCMAINS: Okay.

MR. SOULES: Let's do it.

JUSTICE HECHT: In fact, along the lines of what we had in mind following that language was if substitution of a party in the Appellate Court is necessary for any reason other than death, the Appellate Court may order such substitution upon motion of any party at any time.

MR. MCMAINS: Well, but that -- I just think that there is -- there are implications for something that is quite -- that broad, to give the court discretion to just pull some party in who may for whatever reason not want their name there

and it may not be necessary to be there. I'm talking about the takeover situation and things like that. It may be that name is one way. They need to be one way for one purpose; and for purposes of internal contracts I'm not sure the appellate courts really ought to get embroiled in the battle as to whose name ought to be in the cases. And as a substantive matter I don't think we have a problem determining who it is going to be responsible to respond to the judgment, whatever those things are subject to being amended at some other times. I don't like to see that substantive fight being converted into procedure.

MR. SOULES: Justice Hecht, what is the Federal Rule of Appellate Procedure?

JUSTICE HECHT: Appellate Rule 43(b). It's in the --

MR. FULLER: On motion of party, doesn't it?

JUSTICE HECHT: It says essentially what I said, except it does not refer to the procedure that's used if there's

a death.

MR. SOULES: Justice Hecht, would you read your proposed language one more time?

JUSTICE HECHT: "If substitution of a party in the Appellate Court is necessary for any reason other than death, the Appellate Court may order such substitution upon motion of any party at any time."

MR. SOULES: Would you object to adding "or as the Court shall otherwise determine"? That seems to be limited to motions of parties.

JUSTICE HECHT: No. I have no objection to that.

MR. SOULES: This is short then. Get Justice Hecht to mark up there. I'll read it. Here's the language. It would be a new Paragraph D to TRAP Rule 9. It would read as follows. The caption would be "Substitution for Other Causes."

MR. FULLER: What about public officer cause of death?

MR. SOULES: Well, C is

whenever a public officer is replaced.

MR. FULLER: Okay.

MR. SOULES: The operative language is this: "If substitution of a party in the Appellate Court is necessary for any reason other than death, the Appellate Court may order such substitution upon motion of any party at any time or as the Court may otherwise determine."

MR. FULLER: It's a possibility.

MR. SOULES: What about death or separation of office, since that's already covered a different way? Let me get the rule book.

JUSTICE HECHT: I've got it.

MR. SOULES: You've got a rule book?

JUSTICE HECHT: Yeah.

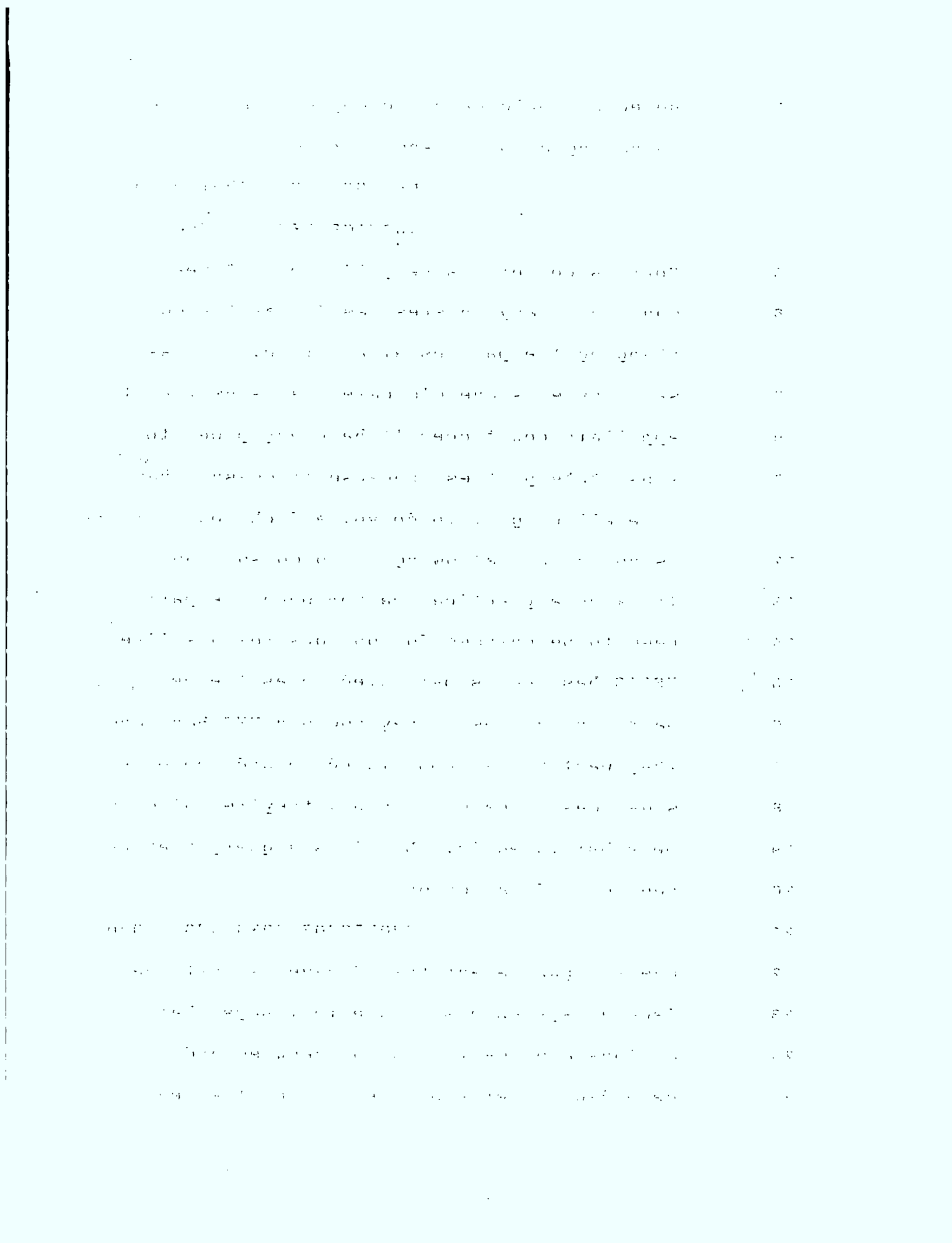
MR. FULLER: It looks -- sounds to me like on the filing of the motion that the Court could do that without the necessity of a hearing. I don't think that's what the people here have in mind doing if

someone should cause to object, make reference to having a motion and hearing.

MR. SOULES: That's not --

JUSTICE HECHT: The Court's concern is very limited. I mean, they don't have any interest as far as I know in changing the parties at any time. But as I say, there is one old case that says that the appellate court doesn't have any power to substitute parties, because it doesn't have a rule allowing it to do so, and obviously there is not a rule allowing it to do so. So I think as a practical matter when the parties need to be changed for obvious reasons like FSLIC has been substituted in as the real party in interest, they now own XYZ Bank and they want to be substituted in and the other side doesn't care, probably they're going to be substituted in. But it's a query that we need clarification on.

PROFESSOR DORSANEO: One overall puzzlement that I have is that the federal system has a rule that says that actions are meant to be prosecuted and defended in terms of the name of the real



party in interest. We have no such rule and don't follow that practice as a matter of a formal requirement. You can proceed in the name of some other person in particular instances, and that's recognized. The Federal Real Party in Interest Rule has been criticized on occasion as creating as much mischief as it prevents, and it seems to me that this is potentially a larger kind of a question that maybe is not reflected completely in this FSLIC, FDIC kind of analysis.

I suppose I would be thinking in terms of someone being substituted in as Rusty was suggesting who really is saying that they're not a party and don't want to be a party. They may have some interest in the controversy, but it's a different kind of an interest than the interest to be named as a party in the style of the case.

I'm troubled by it. I would like to know before going forward when that provision got in the Federal Rules of Appellate Procedure, what the commentary is. And I can certainly look myself. I understand

that. What the commentary is and the background of it, and whether it's related to this overall semi-philosophical notion about how litigation ought to be prosecuted in the name of the real party at interest in a formal requirement or just in accordance with our prior practice.

MR. SOULES: Let me see if I can narrow this suggestion, and this is being suggested without first conferring with Justice Hecht. But if we said, "If substitution of a successor to a party in the Appellate Court is necessary for any reason," that's not going to reach out and grab new parties, different parties, unrelated parties. That's only going to get a successor substituted in.

JUDGE MCCLOUD: That's much better.

MR. SOULES: "If substitution of a successor to a party in the Appellate Court is necessary for any reason other than death or separation for public office, the Appellate Court may order such substitution upon motion of any party at any

time or as the Court may otherwise determine."

MR. FULLER: I like that better.

JUDGE CASSEB: You're going to need that. Otherwise the Court is going to determine on the motion.

MR. SOULES: But there might be no motion. That's what that's directed to.

JUDGE CASSEB: The Court may do it. It's an awful lot better, because otherwise you're going to get confused as to what you could do in the trial court.

MR. SOULES: Let me get a consensus if that's okay, since it's not written up. I'll pass this sheet around. Is there a consensus that this will be do-able? No objection. I'm going to pass this around so everybody has a chance to look at it written down, and remind me and I'll get back to this before we leave today.

JUDGE CASSEB: Do you want us to initial that?

MR. SOULES: I'll just take a vote later, Judge. I just don't want

to if we can avoid passing on something that they haven't looked at in writing. I would like to avoid that.

JUDGE CASSEB: All right.

MR. SOULES: Now we go to 20 on page 137; 137, we've probably already done that.

MS. HALFACRE: Yes.

MR. SOULES: Okay. I guess we've covered this point on TRAP 20; and now we are to a report from Elaine. This arises. Not to get anything from Elaine's thunder, but we had a statute passed. It was introduced by Senator Parker, and it doesn't vary much from our rule, but my charge to Elaine as chairman of this subcommittee and Elaine is chairman of the special subcommittee on these supersedeas rules was to review the statute to try to make our rule conform to that statute so that there would be no inconsistencies, so that there wouldn't be two places where people might look for supersedeas information; that they could look at the statute and what they found would not be inconsistent with the rule, and they could

also look at the rule, same result but the rule is a lot more extensive than the statute. The statute is narrower and just doesn't cover as many of the situations, as I understand it.

And Elaine has done that, plus she has considered a lengthy writing that had been before us at our last session which we tabled until this meeting. So that's what this report is about. It does include response to recent legislation out of the current legislature. Elaine, could you report, please?

PROFESSOR CARLSON: What Senate Bill 134 does as far as your focus this morning -- it will become effective in September -- it modifies the period for waiving a mandatory supersedeous bond to forestall execution of money judgment in certain kinds of cases. The legislature has modified slightly the standard for that change in security. So one of the questions that we have, of course, this morning is whether or not it is prudent for us to modify the standard in Appellate Rule 47 to comply with

the legislative mandate of the standard in other or certain kinds of cases and if that consistency is desirable.

Another question that was raised in Senate Bill 134 dealt with an inquiry that Justice Kilgarland addressed to the committee previously, and that is whether or not the amended TRAP Rule 47 continues -- in 49 continues to allow the Texas Supreme Court to review for excessive enough or insufficient security that might be ordered now by the trial court or Court of Appeals for partial execution on a money judgment pending appeal.

I do want to note in fairness to the Committee for Administration of Justice, and I included in the materials -- I believe they were on page 174 -- a notation that the Committee on Administration of Justice at some point, and I really don't know the date -- I just found it in the material that I had from the last meeting -- had disapproved of that suggestion. But Senate Bill 134 does specifically set forth that the Texas Supreme Court have the power of review

of excessiveness and inadequacy on the order of security in those kinds of cases also described in Senate Bill 134. And so I went ahead at Luke's request and put the draft before the committee's consideration amending the Rule 49, which will give the Supreme Court that power.

The long and short of it is and the key documents I think you want to look at is on page 140, proposed amended Rule 47. On page 158 is your proposed amended Rule 49. And on Rule 149 is the bill analysis, more or less.

PROFESSOR EDGAR: Elaine, are you also recommending an amendment to Rule 49?

PROFESSOR CARLSON: Yes.

PROFESSOR EDGAR: Where is that?

PROFESSOR CARLSON: Page 168.

PROFESSOR EDGAR: Okay.

PROFESSOR CARLSON: The proposed amendments for this morning are 140 and 168, in this area.

PROFESSOR EDGAR: Okay.

MR. MCMAINS: Elaine, are you proposing that we go further than the bill, basically.

PROFESSOR CARLSON: No. That was not my charge.

MR. SOULES: Elaine, what was your remark, your comment? That was not --

PROFESSOR CARLSON: That was not the intent.

MR. SOULES: Okay.

MR. MCMAINS: All I'm saying is that the bill was limited to particular classifications of cases.

PROFESSOR CARLSON: That is true.

MR. SOULES: Yes.

MR. MCMAINS: This amendment is universal?

MR. SOULES: That's right. And we have tried to set universal standards in all cases.

MR. MCMAINS: I understand that. But I'm just saying the only reason

that bill passed I am reasonably confident is because of what was left out of it. Now, all I'm trying to figure out is, are we going to stick it back in which is going to get in the same problem we had with the legislature before with Higgins and others of doing things here that could not get done in the legislature and would not have gotten done the way they were done if a compromise hadn't been struck?

PROFESSOR CARLSON: I'm just the draftsman. I'm the proponent of either version.

MR. MCMAINS: I understand. It looks like we need Lefty again, Luke.

MR. SOULES: Well, the Senate Jurisprudence Committee was receptive to, once the explanation was given, to the fact that Rule 13 had been drafted to cover privileged pleadings in all Texas litigation, not just in tort litigation as had been the case in Chapter 9 of the Texas Practice & Remedies Code, which was a portion of the tort reform; and the Committee essentially reacted

to -- the reaction of the Committee essentially was, "Well, we ought to amend our statute to cover all cases. We shouldn't just limit that to tort cases."

Of course, they were territorial about having a statute. They didn't want to concede the statutory process to us, but the fact that we had made a universal rule for all cases out of the frivolous pleadings part of the tort reform statute was not objectionable certainly to Senator Glasgow and to the Committee people that were present when I was there in this session talking about that expansion of frivolous pleadings points.

MR. MCMAINS: I'm not talking about frivolous pleadings. I'm talking about the bond rule.

MR. SOULES: Right.

MR. MCMAINS: I'm talking about authorizing less than supersedeous on any basis of money judgment case on what, in essence, your interest is. That bill would not have gotten where it was or had any consideration at all had it been universal.

Parker knows that, and Parker cut that deal; and I'm saying that if you try and make this universally applicable, including to insurance cases, that is directly in defiance of the deal that was cut.

JUSITCE HECHT: And the language of the statute.

MR. MCMAINS: And the language of the statute, that's right, which does not authorize that and might well be construed to be just the opposite. The statute says: To the extent there's any conflict, then the statute controls.

MR. SOULES: Let's see.

JUSTICE HECHT: The statute also says notwithstanding the rule-making provisions.

MR. MCMAINS: That's right.

JUSTICE HECHT: The code, "The Supreme Court may not adopt rules in conflict with this chapter."

MR. FULLER: They discovered that language and used it several times.

JUSTICE HECHT: Finally found it.

MR. FULLER: Found the Golden Rule.

JUDGE RIVERA: I think if you divided it into two parts and --

PROFESSOR DORSANEO: That provides for page 140.

JUDGE RIVERA: -- you can identify --

MR. SOULES: I recognize Judge Rivera for his remarks.

JUDGE RIVERA: I think if you divide that just into two parts, and the person will be that identifies the type of judgment in wrongful death, workman's comp and so forth if the statute shall be; and then the other section, all other judgments, and leave it like we had it. And that --

MR. SOULES: Elaine, are you getting this suggestion; that is, that we, what, Judge, take B as it now is in 47(b) and put that, limit that to the cases that are excluded from coverage by the statute; and as to cases that are covered by the statute, use

the statutory language?

JUDGE RIVERA: I think so. You might have to reverse and put the statutory language first and say, "all other judgments."

MR. SOULES: And that would square the rule and the statute together.

JUDGE RIVERA: The statute wouldn't go against that.

PROFESSOR CARLSON: We could. I don't have strong feelings one way or the other. What we end up with then is the standard for waiving supersedeas in certain kinds of judgments based on a showing of irreparable bond, and the rules now read not posting the bond with cause for substantial harm to the judgment to the creditor. And in other kinds of cases the standard the legislature sets forth it would say you can waive -- the trial court can waive the right to a supersedeas bond showing the judgment of creditor still irreparable harm. And now a standard to that setting security of a lesser amount would not substantially decrease the

degree to which the judgment the creditor recovered would be secured.

The standard is pretty darn close, but there's not quite --

MR. MCMAINS: No. There's a big difference actually.

PROFESSOR CARLSON: How far of a difference there is I guess would depend on initial interpretation; put it that way.

MR. SOULES: As I get the sentiment of the committee all we want to do now is document the rule the way the law is, which is we've got this rule already on all cases and we've got a statute to take some cases out of the rule, and we'd like to make the rule reach the cases that have now been taken away from it by statute by putting that into the rule.

PROFESSOR CARLSON: All right. Then I think Judge Rivera's suggestion is a very good one.

JUDGE BEARD: Judge, the Section 52.0011 takes away that real property lien. See, when we adopted the rule

originally that was one of the questions: How do you keep from abstracting a judgment under the statute and establishing a lien which gives them priority after 90 days perhaps in bankruptcy? We ought not to do anything. This adds to our rules, because you can keep the lien from attaching under that section. So we don't --

MR. SOULES: We're not attempting to do anything with 52.0011. That statute is going to be in the Property Code and lawyers are going to have to go there to look for that. We're not talking about putting that in the rule at all.

JUDGE BEARD: Like I say, if you want to modify that rule so that the rights which we have under our rule are limited to these particular cases. That's all I'm saying.

MR. SOULES: That was done. The suggestion now is that we maybe add a (b) which tracks the statute for the cases that the statute controls and then renumber all of the rest of these parts of 47, one letter later in the alphabet and change the

(b) to say: In cases not covered by (b), then (c), and follow the same -- in all other money judgments, follow this language.

JUDGE RIVERA: Maybe (b)1 and (b)2 if you don't want to change all of them.

MR. SOULES: Well, we could do that. (b)1 ask (b)2; let's do that.

MR. TINDALL: Does Senator Parker not care about the others? You know, we're getting into --

MR. SOULES: We've already got a rule, and didn't repeal our rule.

MR. TINDALL: I understand that. Are we going to get into another legislative tiff?

MR. SOULES: No. I don't think so. Senator Parker I don't think intended to walk on our rule, but he wanted it passed and he got it passed, and it's different from our rule, and we need to meet it.

Okay. Let's see what the consensus is, and we'll try to get something written up. Is there a consensus that we make

47(b) now two matters, (1) to cover the cases that are embraced by the statute and use the statutory standard for those cases and (2), then, for other cases, to leave the rule as it is? Is that a consensus? Those in favor say, "Aye."

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed?

ADVISORY COMMITTEE: (No response.)

MR. SOULES: Do some writing and try to get it on the table for later discussion even if it's handwritten. Tom Davis.

MR. DAVIS: Since we seem to be concerned with the public relations with the legislature, is there any reason why when we get our amendment worded the way we want it, that someone would maybe present it to Senator Parker in case he does have any objection?

MR. SOULES: I'll be happy to do that if that's the consensus of the Committee. I think it's a very good suggestion.

PROFESSOR DORSANEO: I don't know if you want to start that policy or not, but that' certainly one way to avoid getting crosswise.

MR. SOULES: Well, I think if that's the consensus of the committee, I will do that. I have recently had dialogue with Senator Parker. Is that the consensus of the Committee? Any objection to me passing this by Senator Parker?

ADVISORY COMMITTEE: (No response.)

MR. SOULES: All right. Elaine, could you maybe write something, even in longhand, and we can get it copied, several copies made and distributed later in the day?

PROFESSOR CARLSON: Sure.

MR. SOULES: You had something then on -- does that take care of the suggestions for 47?

PROFESSOR CARLSON: That takes care of the suggestions for 47. I'd like the Committee's input on 49.

MR. SOULES: Now we'll go to page 168 and look at TRAP 49.

MR. MCMAINS: What I was privately trying to ascertain is I think there are two things we're doing.

PROFESSOR CARLSON: TRAP 49 as suggested on page 168 addresses three things really. One is Senate Bill 134, includes this power and certain kinds of cases for the Supreme Court to review for excessiveness, and to enter order accordingly. Secondly, Justice Kilgarlin put forth to the Committee in his letter the Supreme Court query on whether they retained that power after the '88 amendment to TRAP 49. I guess that letter again on page 149 of the materials.

And then thirdly, I want to point out that we did have the materials from last time and COAJ may want to express. On page 174 the COAJ had previously recommended that the change expressly providing for excessiveness review of the security penalty by the Supreme Court not be included in an amended Rule 49. And again, I am the draftsman on this and was asked to pull the materials together and put it forward for

the Committee, but if you have suggestions...

MR. SOULES: Do you see any legal problems, Elaine, with the suggestion, with the drafting that's been suggested on 168.

PROFESSOR CARLSON: No.

MR. SOULES: Do you recommend that the Supreme Court make these changes?

PROFESSOR CARLSON: I think it's something that the Committee ought to discusses.

PROFESSOR EDGAR: I'd like to know what the view of the COAJ was.

MR. SOULES: I was at the meeting.

MR. BISHOP: If I recall correctly, the reason they rejected it was they thought that it was unnecessary, that the Supreme Court already had any power.

MR. SOULES: Well, I think there was more discussion. Doak, that was part of it. One of the discussions was that there was questions about whether or not the Supreme Court had fact-finding authority

constitutionally to make this kind of review, and there was just -- there were several questions about the change, and I think the questions won out. They were not answered. There were just a lot of questions and finally the Commission said, "Well, just disapprove it," not in a refusal to discharge responsibility, but they felt first that there were questions about it and second, that it was unnecessary. That's how it kind of failed.

I don't think there were any strong statements being made by the COAJ that they did not want the changes. It's just that they couldn't decide to warrant them.

MR. BISHOP: I think that's fair. I think there was strong sentiment it was unnecessary, that the power was already there. But I think there wasn't a strong sentiment against it either.

MR. SOULES: Bill, you are recognized.

PROFESSOR DORSANEO: Yes. I see a couple of issues here. I think Rusty probably was going to say what I'm going to

say. The first one doesn't really relate to the question of what court we're talking about. It relates to what I think is a more important issue, and that's whether any appellate court under our current rule has the power to determine that the amount of the security is excessive and to reduce the security accordingly.

As the memo on page 171 indicates the previous version of Section (b) of Rule 49 clearly provided, "In like manner the Appellate Court may review for excessiveness the amount of the bond or deposit fixed by the trial court." If you look at 49(b) now, it is at least unclear on that question as to whether the appropriate appellate court, the one we are talking about, has the power in like manner to review for excessiveness the amount of the bond, and I really think that the reinstatement in clear terms of that power for whatever appellate court is appropriate makes good sense; and likely my recollection of our discussion of this, in the absence of any discussion of taking away that power, indicates that really

we didn't recommend to the Supreme Court the last time to actually remove that power from the Court of Appeals. It's just a language change.

MR. SOULES: How many feel that last sentence proposed, the addition of the last sentence to Rule 49(a) on page 168, that we should add that -- the Supreme Court should add that sentence?

PROFESSOR DORSANEO: But there's another question. That's whether "the appellate court" should be "the court of appeals."

MR. SOULES: Without passing on whether we use appellate court or "the court of appeals."

JUDGE RIVERA: That's what the statute says, "appellate court."

MR. SOULES: How many feel that we should add a sentence that expresses in words that the review for excessiveness is appropriate? Those in favor say, "Aye."

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed?

ADVISORY COMMITTEE: (No

reponse.)

MR. SOULES: That then we'll do. Now, what's the next point?.

PROFESSOR DORSANEO: Well, the next point is going back again --

MR. O'QUINN: Pardon me. In effect, did we pass something or agree to work on it?

MR. SOULES: Well, we are not -- we're going to add language that expresses that some appellate court can review for excessiveness. And now we're going to look at which court, I guess, is the next question. Is that right? That's where I think we are, John. And if we've advanced too far, then we'll go back.

MR. O'QUINN: Lefty looked at me, and we weren't clear. Does this apply in a money judgment in just a basic tort case with a general rule you have to put up the money?

MR. SOULES: It would apply to every case, that the court can review both for insufficiency and for excessiveness, both ways.

JUDGE MCCLOUD: That's not clear here. You need something in here about excessiveness, I think.

MR. SOULES: Right. That's what we're deciding now is do we want the court to be able to review for excessiveness as well as insufficiency?

JUDGE MCCLOUD: A while ago when two voted yes -- make it three.

PROFESSOR DORSANEO: The issue of maybe what John and Lefty are thinking about is before the standard was changed giving trial courts more latitude to reduce the money judgment under certain restrictive circumstances bond to less than the amount of the judgment interest and costs, that was a much smaller issue than it is now. Someone might say that they don't mind having the trial court have restricted authority to change that number, but they don't want the appellate court having independent authority to do so if it wasn't done in the trial court. And that is -- I can see someone could say that enough of this is just enough. So my remarks about well, just reinstating things

were really probably overly simplistic, because the context has changed.

MR. SOULES: Discussion.

MR. FULLER: Now that I understand it, I have something to say, but I'll wait my turn.

MR. SOULES: Rusty, you had your hand up.

MR. MCMAINS: There is another issue in this, Parker's bill, for that matter. There is whole kinds of procedural morass, which I'm sure that Elaine decided to duck.

MR. SOULES: I doubt that.

MR. MCMAINS: And properly so. I mean, there's all kinds. There's purported vesting of continuing jurisdiction in the trial court to review a lot of things that it's doing; and once it does it, then something becomes automatically done. I mean, they file something, and it has the effect of removing an abstract, and then you unfile it or file a revocation of it, and it renews it again. And I mean, there are a lot of

procedural problems just in terms of who's doing what to whom in terms of the appellate, whether you're doing it in the trial court or whether you're reviewing the trial court's doing it or whether you're actually doing it for the first time in the appellate court. And if you do it the first time in the appellate court, who is doing the rest of it? And the Parker bill purports to give that continuing authority to the trial court, to my recollection.

PROFESSOR CARLSON: Are you talking about --

MR. MCMAINS: That is the third problem. It's all tied up with the bond issue too, because once they set the security at a different level on that basis, then they also start suspending enforcement of the lien and then you go back to all kinds of procedures. I mean, the listings in that bill for having further hearings and making further motions before the trial court.

PROFESSOR CARLSON: We have --.

MR. MCMAINS: And I'm

trying to figure out what -- we're creating a lot of bills, creating a lot of competition between the trial court and the appellate court as to who is doing what to whom.

MR. SOULES: Let's look at page 143 together for a moment and see if we have really much choice here about the question of review for excessiveness. On page 143 in Section 52.004 it's captioned, "Review for Excessiveness." This is a statute now that's been signed by the governor. "In a manner similar to appellate review under Rule 49 of the sufficiency of the amount of security set by a trial court, an appellate court may review for excessiveness the amount of security set by the trial court under this statute or under the rules." I mean, that's the law. Shouldn't our rule conform?

MR. FULLER: It's settled, it looks like to me.

JUDGE MCCLOUD: Yes.

MR. SOULES: John O'Quinn, you have your hand up.

MR. O'QUINN: I may be looking for a little information. I

understand what we've done is we've got a two-sentence rule at the trial court level. One sentence is to track what this statute says and therefore this, as an example, would not apply to the personal injury case. In the second sentence of our rule for trial courts, it's much larger of a standard. It would have to cause irreparable harm, all types of things.

MR. SOULES: Right.

MR. O'QUINN: Are we going to overlay that, this Rule 49 on page 168 to say you would have appellate review of both sentences under that trial court rule?

MR. SOULES: Yes.

MR. O'QUINN: That's the intent. Okay. And we are doing that because the statute in -- the legislative statute said that they wanted appellate review of what is, in effect, the first sentence of our trial court rule. They wanted appellate review of whatever his legislation wanted the trial courts to be doing. Now we're going to have appellate review of the substantive.

MR. SOULES: John, it's

already there. It's in the statute. Both reviews are in the statute.

MR. O'QUINN: I got lost on that statement. Where are the other reviews? The statute is limited to non-personal injury cases.

MR. SOULES: I just read it, 52.004, and that is review for excessiveness of security set either under this statute or under the Rules of Appellate Procedure both. It's on page 143.

MR. O'QUINN: I see your point, Luke.

PROFESSOR DORSANEO: Am I reading this wrong, or does 52.004(a) restrict itself to security set by the trial court, that is to say a trial court order as distinguished from security set by a procedural rule that could be varied by a trial court order?

As I understand it, if it's the judgment interest and costs and it's not varied, that's not set by the trial court. That's automatic unless unset by the trial court. If what they were intending to

do with this 52.004 is to reach both situations, then I'd have to do further study to see whether the legislative history says that, because the statute on its face doesn't.

JUDGE RIVERA: Section C at the bottom, 52.005, says it does not apply.

MR. FULLER: Yes.

JUDGE RIVERA: It says this in only for those causes of action pertaining to Section 52.004 does not apply. They put it in and take it out.

MR. FULLER: That's right. They sure do.

JUDGE RIVERA: Is that what it says?

MR. O'QUINN: That's what it says.

PROFESSOR DORSANEO: I don't understand. It doesn't say anything else.

MR. SOULES: Well, you read the heading in that, though, Judge; 52.005 says, "to the extent this chapter

conflicts."

JUDGE RIVERA: Yes. This chapter governs.

JUDGE CASSEB: Read C.

MR. SOULES: "This chapter controls."

JUDGE RIVERA: They say "chapter," not "section," because it means the whole thing.

MR. FULLER: Come on, gang. I don't think we really have any disagreement of what they were trying to do.

MR. SOULES: Well, does anyone want to change their prior vote? We will put in a sentence about, it says review for excessiveness. And now we're to the question of what court.

PROFESSOR DORSANEO: The only thing I was going to say is that when 49(b) started out being in the 300s, I guess it was Rule 377 of the Texas Rules of Civil Procedure, it was in the part of the rule book that dealt with the court of appeals, and I frankly think it's not so clear that the Supreme Court ever had authority to review for

excessiveness and am dubious about which jurisdictions do so. I think when the rule said "Court of Appeals," that was a conscious choice with that problem in mind, and I don't have any particular feeling about it one way or the other, but I think that's the background.

MR. SOULES: Yes. When the Rules of the Appellate Procedure Joint Committee of legislators, practitioners, Court of Criminal Appeals and Supreme Court representatives drafted, put these rules together, they -- this was carried forward, and it was just the Court of Appeals that had review authority, as I recall it. And I may be going on forward to the time whenever we were in committee sessions on 47 and 49, but it was discussed that this review required fact-finding. Maybe it doesn't, but that was the discussion. And the fact-finding constitutionally stopped in the Court of Appeals and did not move to the Supreme Court, and that's why the Court of Appeals was used where it was used. Maybe that's wrong, but it was not inadvertent. It was for that reason.

MR. FULLER: That's what bothers me about this whole thing. It sounds like the appellate court is put in the position of having evidenciary hearing.

MR. SOULES: The Court of Appeals can, but the Supreme Court can't.

MR. FULLER: I mean taking testimony. They sent it back to the trial court to develop evidence and bring up again, throwing the damn ball back and forth. We don't have any choice. The statute is here. But they're going to be taking testimony.

PROFESSOR EDGAR: Bill, are you suggesting then -- I guess you are -- that 52.003 and .004 are an unconstitutional delegation of fact-finding for the Supreme Court? Well, I mean we're talking about the statute. Let's forget about the rule and talk about the statute. Wouldn't that necessarily follow?

PROFESSOR DORSANEO: I think it would follow, but I'm not going to say that.

PROFESSOR EDGAR: I know.

PROFESSOR DORSANEO: My

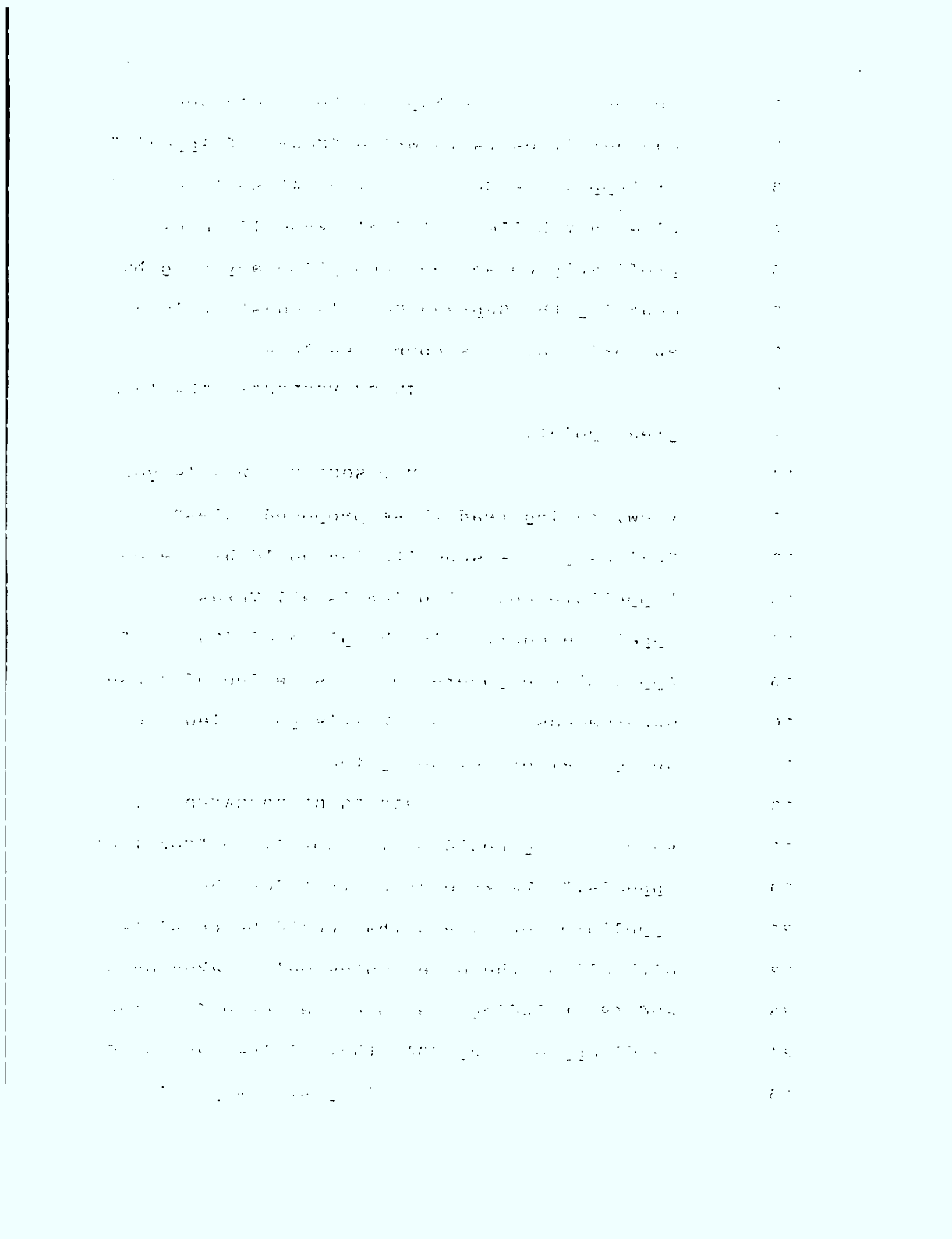
own belief is the Supreme Court can decide whether it wants to write "Court of Appeals" or "Appellate Court" in that 49 sentence and bite that bullet. I don't know if we can profitably do any -- accomplish anything by debating the Supreme Court's constitutional authority at this committee level.

JUDGE MCCLOUD: That's a great point.

MR. SOULES: What's your view, having read these proposed rules? Obviously, the substitution would be the words "appellate court," which is all Texas appellate courts, in the place of "Court of Appeals" everywhere there is review of these supersedeas matters. What's your view about doing that or not doing that?

PROFESSOR DORSANEO: The safest thing would be to substitute "Court of Appeals." We know about that for the appellate court, and that would be consistent with all of the other votes we've taken on 47 and 49 including that one that came from the -- disapproved by COAJ that Elaine mentioned.

If it just was put in



there the appellate court, there would be some who would contend that that even though this is in Section 4 of the TRAP rules that that gives the Supreme Court the same authority as the Court of Appeals and the appellate court means the Supreme Court. Frankly, that wouldn't bother me so much either. We'd just leave the same degree of controversy that we have now.

MR. SOULES: Let's look at this. If we carry this through, though, we go to the last line of 49(b) and we say the Supreme Court can't find facts, but the last line of 49(b) takes care of that constitutional problem, because it says if we use the words appellate court may remand to the trial court for findings of fact for the taking of evidence. So the Supreme Court, if it decides that it doesn't have the constitutional authority to consider affidavits as factual and make a fact decision, the Supreme Court could remand to the trial court for the trial court to find certain facts, send it back to the Supreme Court, and the Supreme Court accept those

facts as they are presented and pass on them as a legal matter.

So there is a mechanism here for the Supreme Court to act within the constitution, its constitutional authority.

MR. BEARD: Not for excessiveness as it stands now. No evidence is one thing, but --

MR. SOULES: Let's take a show of hands. Is there any further discussion on whether the "Court of Appeals" or "appellate court" should be the term used in TRAP 49?

ADVISORY COMMITTEE: (No response.)

MR. SOULES: There being none, I'd like get a show of hands. How many feel that "appellate court" should be the term used? Show by hands, please. 16. How many feel otherwise? Well, that's unanimous. Okay. So we are going to use "appellate court." Now, let's vote on the text as it appears on 168, or discuss it. Is there any further discussion on the -- before we vote on the text exactly as it appears on page 168?

MR. MCMAINS: What I'm concerned about is the procedure that you're talking about. You're talking about the insertion of this language right there in (a), right?

MR. O'QUINN: The last sentence.

MR. MCMAINS: The last sentence.

MR. SOULES: That's the language that's on the table.

MR. MCMAINS: Right. The statute itself talks about it in terms of review of the trial court decision.

MR. O'QUINN: That's right.

MR. MCMAINS: And this whole rule on (a) talks about deficiency in general as you go before the "appellate court." I'm trying to figure out, can you raise it for the first time in the Supreme Court? You have never raised it before. You just do it the first time in the Supreme Court. It looks to me if that's what you use, this rule, you can go to the Supreme Court the

first time and say that.

MR. SOULES: That is right, because you can now go to the Court of Appeals for the first time for a review. The rules were designed to have supersedeas review power both in the trial court and Court of Appeals.

MR. MCMAINS: I understand.

MR. SOULES: First impression. So if we put the appellate court in the Court of Appeals position mainly then we're going to have --

MR. MCMAINS: We're talking about you can just go there. They can do it and never have any, there were no provisions for hearing or notice. I mean, you don't have hearings in the Supreme Court where the parties show up and do anything. I mean, I don't understand procedurally what it is that we're contemplating, because I don't think that was contemplated under our current Rule 49.

We have very significant -- under our current Rule 49 we do have

provisions where you can issue temporary orders and then if you do something, you can send it back to the trial courts for development of new testimony or whatever, but we are not constraining them all in that.

I mean (b) talks about appellate review of expenses. And all of a sudden up here in (a) we're talking about sufficiency. I guess the title would have to be sufficiency or excessiveness, but I mean, we have a fairly definitive idea of what the appellate review issue is on the expenses of the enforcement. I'm not comfortable with the notion that the Court of Appeals or the Supreme Court either one is just going to haul off on its own and make any determination with absolutely no provisions as to what the procedure is by which they accomplish that other than file motion.

MR. SOULES: 49(a) was designed and does provide that the Court of Appeals initially can make an initial review of a bond. It does not have to come there from the trial court. Either the Court of Appeals or the trial court can review a bond

pending appeal. When we put the appellate court, the words "appellate court" in the place of the Court of Appeals, then that power is expressly stated in the rules to go also to the Supreme Court, the initial review of the trial court. John O'Quinn, you have your hand up.

MR. O'QUINN: Here's my problem, Luke. The statute we were trying to work with severely limits the authority of the trial court to change what otherwise would be the amount of the bond. And secondly, the statute says in (a), 52.004(a), it says that "the appellate court may review for excessiveness the amount of security set by the trial court." To me that contemplates the idea that the trial court has first done it and the appellate court is coming in and doing a review. And to me what we've got now in Rule 49 is misunderstood as a device that says: whether the trial court has done anything or not, the appellate court can reach out and change it on its own. It doesn't say: if the appellate court finds the amount of the security set by the trial court is

excessive. It says: if they think it's excessive for any reason. That's the first problem.

The second problem is the way --

MR. SOULES: That first problem is in the law the way it is right now.

MR. O'QUINN: I disagree. I think that we could read the law differently. I see (b), which is where we got the sentence. (b) is part of 52.004, and I think (b) has to be read in context with (a). (a) says that the appellate court may review for excessiveness the amount of security. And (b) in my judgment means -- I'm looking at the statute -- if that review of what the trial court has done leads to the conclusion of excessive, then the appellate court here can remedy. First you have the right and then you have the remedy. You can't separate (b) and say it stands on its own weight. That's part and parcel of the same thing.

MR. SOULES: Maybe.

MR. O'QUINN: That's the

way I read it. My second problem is that I believe the intent of it was more or less the appellate court to be in a reviewing situation rather than a de novo situation. And I think it ought to be bent back toward the idea that if the appellate court determines that the trial court has the duty or discretion in doing its job and setting security, then it can do something, but not just de novo where the trial court says it should be this way and three guys on the Court of Appeals say, "Well, we see it differently." He's on great weight if the appellate court doesn't get to put these back, said, "We don't like what you did."

We have got to go back. I frankly just see the way this sentence sits now in Rule 49 goes well beyond what the statute tells me it was intended and creates a situation where all the limitations that are imposed upon the trial court about changing security can be disregarded at the appellate court level, and the appellate court could just -- there is no standard.

What standard does the

appellate court determine it was excessive? Just because they don't like it or they think it's too much? That's not what Parker was saying. Certainly in personal injury cases what we're saying in sentence number two, we are saying that that's already in the rules at the trial court level. The trial court makes a very strong finding, judgment to debtor, no harm to the creditor, things like that. Are we going to bypass all the standards? If that's the intent of Rule 49, I'm going to be hollering and voting "no," because I think those standards are crucial and must be respected by the appellate court. And Rule 49 must be tied to the standards in some way in order for me to go along with that.

MR. BEARD: We decided that question a couple of years ago. That's just starting all over again.

JUDGE MCCLOUD: Let me say this: I think what you've just said makes a lot of sense from the standpoint of certainly the Court of Appeals. I haven't studied the statute that we're referring to and really

determined how that statute fits in with the existing rule, but from the standpoint, I think, of judges on the Court of Appeals, they would feel much more comfortable and seem like a more proper place for the Court of Appeals to be would be to be reviewing a decision that's been made by a trial court after there has been evidence presented on the matter and then it comes up to the appellate court, and it seems to me like the appellate court probably should at that point say, "Well, we think maybe abuse of discretion is the right standard, that from this record which has been presented the trial court has abused its discretion or you have failed to show that the trial court has abused its discretion."

It would seem very strange, I think, for a court of appeals to be there with three judges and start taking evidence. We don't have court reporters, and we don't have a lot of other things. It doesn't quite fit, to me. It seems much more consistent that the Court of Appeals would be reviewing what a trial court has done, which is we do this all the time to determine

whether or not we reach a decision that there has been an abuse of discretion there.

MR. SOULES: Let me see if I can --

JUDGE MCCLOUD: I feel certain that that's probably the intent of this if we really study the statutes which I don't feel that I'm in a position to say too much about, because I haven't studied it that closely, but it really does strike me as strange that you would be presenting an excessive point or an insufficiency point to an appellate court for the first time and that court would be out there saying, "All right. You testify," and "That's hearsay," and et cetera and so forth. It seems to me like it ought to come up from the trial court and then the appellate court then ought to rule what -- and it should go on to the Supreme Court.

MR. SOULES: Okay.

JUDGE MCCLOUD: But the mechanics of it, I think you've raised a very good point. I think the mechanics are real important, and I don't know exactly how this

rule is being interpreted, but I think we should give that some serious thought.

MR. SOULES: Here's the way the rule read before, and it was a review only. It in the gray book. This is the 1988 rule pamphlet. It says right under (a) there was a (b).

PROFESSOR DORSANEO: Page 168.

MR. SOULES: And it said, "In like manner the appellate court may review for excessiveness the amount of the bond or deposit fixed by the trial court and my reduce the amount if found to be excessive." Now that is a review function only.

MR. FULLER: 52.004, the statute almost tracks that language.

MR. SOULES: There are two ways to get to excessiveness on a review basis only. One would be to go into the text of 49(a) and everywhere you see "sufficiency" just add a word "or excessiveness," so either way you've got the same operative words, or to add this sentence back that was taken away, which I thought was taken away because it was

considered redundant, but maybe not.

PROFESSOR DORSANEO: If all of what Justice McCloud and John O'Quinn have said is the consensus, I don't know why all of that is not already contained in current 49(b). When it says, "The trial court's order is subject to review by motion to the court of appeals or appellate court," it's a little bit terse. You could say the trial court's order pursuant to Rule 47 is subject to review for insufficiency or excessiveness by motion to an appellate court, but it just seems to me that if it is a review kind of situation and if the trial court is meant to deal with the problem in the first instance, the trial court is going to deal with it by making some sort of an order granting relief or denying relief, and that that's subject to review on motion. I thought that's what this all meant all along and I haven't really frankly understood what this tempest is about.

MR. O'QUINN: Luke, if I may add. Why don't we pull that sentence down into (b) and say something like trial court

order pursuant to Rule 47 is subject to review and if the appellate court by such review find it to be excessive, then such and so.

MR. SOULES: Okay. John, since we have operative language in 49(a), and this is just a question --

JUSTICE MCCLOUD: The last sentence bothers me.

MR. SOULES: If we don't add the last sentence, say we don't add the last sentence and we just say where every place in the existing language of 49(a) "insufficiency" should probably be changed to "sufficiency," so I'm passing that, "shall be reviewable by the appellate court for sufficiency or excessiveness," add those words "or excessiveness" after "sufficiency" each time it appears so that it just indicates that you have the same review process both ways.

MR. O'QUINN: That's fine.

JUDGE RIVERA: I think that will do it.

MR. SOULES: Then if you will work with me through 49(a) as it appears

on page 168 as I'm hearing the suggestion, we would not add the underscored sentence at the end. And what I'm trying to put on the table as a possible solution to our discussion here is that beginning with 49(a) with "sufficiency," with "sufficiency of a cost or supersedeas bond or deposit or sureties thereon or of any other bond or deposit under Rule 47 shall be reviewable by the appellate court for sufficiency or excessiveness of the amount or the sureties or the securities deposited, whether arising from the initial sufficiency or excessiveness or from any subsequent condition which may arise affecting the sufficiency or excessiveness of the bond or deposit."

PROFESSOR EDGAR: Should not you also have "or excessiveness" in the very first line, "sufficiency or excessiveness"?

MR. SOULES: Yes. And then the next sentence would read -- Hadley, I think that's very much needed. "The court in which the appeal is pending shall upon motion showing insufficiency or excessiveness" --

MR. FULLER: Why don't you just substitute "appropriate" next, "requiring appropriate bond or deposit be filed with."

MR. SOULES: All right.

MR. MCMAINS: That's not what we're talking about. We're talking about a review. I've been trying to figure out, why are we dealing with (a) at all?

MR. SOULES: Well, let me try to get through this. You can vote it down.

PROFESSOR DORSANEO: Move that second sentence to (b).

MR. SOULES: The second sentence should be moved to (b)?

PROFESSOR DORSANEO: I think so.

MR. SOULES: What I'm trying to do now is make the second sentence neutral is all I'm trying to do. "The court in which the appeal is pending shall upon motion showing insufficiency or excessiveness require" --

MR. FULLER: Appropriate bond instead.

JUDGE RIVERA: Delete that whole sentence out and put the one that was propsed to add it and that would replace it.

MR. SOULES: John, go ahead and talk. What is your suggestion?

MR. O'QUINN: Here's what I perceive to be the difficulty. I read (a) as being the device where somebody can say, "Look, by law the appellant was supposed to put up a certain amount of security. He didn't do it. He didn't get his security up. I want you to do something about it." I don't see (a) as being a device to review whether the trial court made the right decision or not about how much security to put up. I see it more as a ministerial thing. Did whatever was proposed to be put up, did it get put up? And if not, make them do it or do something to them.

But this other subject we're talking about is a matter of reviewing fact findings or for discretionary decisions or things of that nature. And for example, the rule says basically a money judgment you have got to put up the amount of judgment plus

interest. I see (a) as being a device saying, "Hey, he didn't put up the amount of money judgment plus interest." It's a ministerial decision or mathematical decision. We're not talking about those kinds of problems. We're talking about what to do when somebody has asked the trial court to change that amount and how to review that decision.

MR. SOULES: Well, the second sentence of (a) has been in the rules from 1939.

MR. O'QUINN: Even when you have --

MR. SOULES: Because that's when subsequent really was designed and you had subsequent facts, passage of time that made the bond insufficient to cover principal, interest and costs. A motion would be made to the Court of Appeals and they would order the bonds such.

MR. O'QUINN: That's more of the mathematical case, where the case has been laying around for years where the amount of interest -- briefly, interest may put more interest on that.

MR. SOULES: So it needs to be there. Maybe it just shouldn't be changed and change the first sentence to deal with excessiveness, leave the second sentence of (a) the way it is, and then write something new, what the court does if it finds excessiveness, as a third sentence in that 49(a).

JUSTICE HECHT: As I hear what John is saying, and it makes some sense, (a), nobody is going to voluntarily put up too much security ordinarily.

MR. SOULES: Right.

JUSTICE HECHT: And certainly if they put up too much, they're not going to be then heard to complain about it, and that's what (a) is dealing with. The only thing (a) has to do with is if somebody doesn't put up enough and somebody else wants to complain about it because the sureties are not sufficient or bond not sufficient or something changed in the meantime.

(b), as I hear John's comment, is where the court either raises it up or lowers it down different from the

ordinary rules, and the power to review even insufficiency or the excessiveness comes in Paragraph (b). Is that --

MR. O'QUINN: Well put, Your Honor.

MR. SOULES: Okay. What do we do now?

PROFESSOR DORSANEO: Just let that sentence alone.

MR. FULLER: Leave that alone.

MR. SOULES: Leave that alone entirely and change (b) how? I have got to write it down.

PROFESSOR CARLSON: (b), appellate court, and add "for insufficiency or excessiveness."

JUSTICE MCCLOUD: Yes.

MR. SOULES: Okay. Elaine, give me that language again and where it would go.

PROFESSOR CARLSON: Let it be at the end of the first sentence, "the trial court order pursuant to Rule 47 is subject to review by a motion to the appellate

court," and then add these words, "for insufficiency and excessiveness," period.

MR. O'QUINN: That will take us back to Rule 47 and standard of review.

(At this time there was a brief discussion off the record, after which time the hearing continued as follows:)

MR. SOULES: We need to provide that if the trial court's order is entered either under Rule 47 or the statute, somehow get that reached. I don't want to put the statute -- cite the statute in here particularly.

MR. O'QUINN: The trial court's order could be pursuant to the statute.

JUSTICE MCCLOUD: Doesn't the statute have the same type of language about the review of the order, the trial court order? And so if you were coming under the statute, I think it would be consistent, the language would probably be consistent with this language about reviewing the trial court's order. I believe that's the way I

remember that statute.

MR. SOULES: Yes, that's right.

JUSTICE MCCLOUD: I think that's right, and so I think you could just let it go and trial counsel would be bringing you something under 47, or it might be bringing you something under the statute. Is that right?

MR. SOULES: What do you suggest? We need to provide a procedure in the rules for this, trial court's order pursuant to Rule 47 or Article -- Chapter 52 of the Texas Practice and Remedies Code?

JUSTICE MCCLOUD: That would be all right.

MR. SOULES: Or could we just say the trial court's order?

MR. FULLER: Is there anywhere else in the rule that refers to statutes?

MR. SOULES: A few places, but we try to to avoid that.

MR. FULLER: Could you not just say, "in compliance with the statutory

law," or something like that?

MR. SOULES: How about the trial court's order setting security?

MR. FULLER: There you go.

JUSTICE MCCLOUD: Yes.

MR. FULLER: That's good.

MR. SOULES: The statute says setting security. Let's see what the -- where is the operative language?

JUSTICE MCCLOUD: What page in the book, Luke, is that statute?

MR. SOULES: It's on page 142.

MR. FULLER: Applicable force, I believe, on 143, isn't it what we were talking about?

MR. SOULES: Right.

MR. FULLER: Yes, force of it.

MR. SOULES: Actually the trial court's order does two things. It sets security and it stays enforcement.

JUSTICE MCCLOUD: Under both the statute and 47.

MR. SOULES: The statute doesn't say that, but that's what 47 does. But if you combine the concepts --

JUSTICE MCCLOUD: That's got to be what you're doing.

MR. SOULES: -- it sets security and stays enforcement. So if we took looking at 49(b) on 168 it says the trial court's order setting security and setting -- and staying enforcement of a judgment. Then it's subject to review and so forth.

MR. FULLER: Little typo there.

MR. MCMAINS: I'm not sure about the "and" in the sense that really what you're -- it sets the security for staying enforcement.

MR. SOULES: Not under Rule 47. It says, "The trial court may stay enforcement of the judgment based upon an order which adequately protects"... and so forth.

MR. MCMAINS: I understand that. But the point is that what may be, in fact, the topic that they're trying to review

is the fact that they can't meet the order of the court, so I mean, they're looking at the order setting it. Maybe the "and" can get us there. But I'm just saying that's really what you're talking about, what it is that the court has determined is necessary that one or the other parties is complaining about, either too little or too much, and/or genetic within some other format. And you want, I gather, basically to have the reviewing capability as to any of those matters. But it's the actual decision that they make with regards to setting of security pursuant to the authority under Rule 47 for the stay of enforcement that is, in fact, at issue in all of the cases. It was not that they stayed the enforcement. That's done once they have determined on what basis it can be done.

MR. SOULES: How is it done? It's not automatic.

MR. MCMAINS: Upon posting of the bonds it is.

MR. SOULES: No. Not unless the trial courts sign an order to that effect.

MR. MCMAINS: Are you suggesting that you can't supersede a money judgment with the money by filing it with the district clerk without an order of the court? I don't believe that's true.

MR. SOULES: Yeah.

MR. FULLER: You can't review it without an order, is what you're saying.

PROFESSOR DORSANEO: Yes.

MR. SOULES: I think that's right. I think that you don't. But the trial court --

MR. MCMAINS: That's all I've been saying. I mean, it's --

MR. SOULES: Well, let me finish, please, and consider this response to your suggestion, because I'm really trying to respond. It is the order setting security and staying enforcement that gets reviewed. The court doesn't review this; and (b) is, that is not directed to the automatic uptake of bond because time passes. This is talking about the review of a special arrangement, and the special arrangement requires under 47(b) --

MR. FULLER: An order.

MR. SOULES: -- an order staying enforcement based upon the setting of a different security than would automatically obtain the stay.

MR. MCMAINS: I understand that. What I'm trying to get at is you can capture review limited to situations in which they both set the security and stay. That assumes compliance. What I'm saying is that you don't want to say that they have to do both in order to get reviewed, because one of the parties may be saying, "Wait a minute. I can't do that. It hasn't been stayed." And then the other party is saying, "Well, then you don't get to have any review unless you have complied."

MR. SOULES: How about if we say, "The trial court's order staying security" -- I mean -- let me start over -- "The trial court's order setting security or staying enforcement of a judgment is subject to review."

MR. MCMAINS: That's fine.

MR. SOULES: Okay.

MR. MCMAINS: I was just worried about the discussion --

MR. SOULES: I thank you.

MR. MCMAINS: -- because it may not come to fruition.

MR. SOULES: I appreciate the input very much, and the Court I'm sure does.

Okay. So the proposal now on the table is that there will be no change to 49(a) of any kind and that 49(b), as I have it in my notes, would be changed this way: "The trial court's order setting security or staying enforcement of a judgment is subject to review by a motion to the appellate court for insufficiency or excessiveness. Such motions shall be heard at the earliest practical time." That should be capital "S" there. "The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties."

MR. BEARD: You've got to change the caption on it.

MR. SOULES: I'll get to

the caption in a moment. Be thinking about what you think we ought to do with it, Pat.

And then the second paragraph on number paragraph 49(b) would be changed to the appellate court review of the trial court's order. It would be just like it is here in typewritten form on page 168. Before we get to the caption change, please don't pass. We need to change that. Before we get to the caption change, is there any further discussion about these words that I have in my notes as changes to the Rule 49(b)?

MR. MCMAINS: What happened to your "Pursuant to Rule 47"?

MR. SOULES: We're picking up the statute and the rule by using the words "setting security or staying enforcement of a judgment." That's the order that gets reviewed, whether it's done under statute or whether it's done under rule. That was the purpose of working on that language.

Okay. Being no further discussion, those in favor say, "aye."

ADVISORY COMMITTEE: Aye.

PROFESSOR BLAKELY: Change the "by" to "on."

MR. SOULES: There's a text change that I'll take up with Newell in just a minute. Which is that, Newell? Go ahead.

PROFESSOR BLAKELY: For review "by a motion" to "on a motion."

MR. SOULES: Where is that in 49(b)?

PROFESSOR BLAKELY: Break in the sentence.

MR. FULLER: Subject to review "by" change to "on."

MR. SOULES: Okay. Change that to what, Newell?

PROFESSOR BLAKELY: "On."

MR. SOULES: Thank you. That's acceptable to me. Those in favor say, "aye."

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed?

ADVISORY COMMITTEE: (No response.)

MR. SOULES: That's

unanimously recommended. What should we do with the caption, Pat?

JUDGE BEARD: Just say appellate review of the order setting security or suspending enforcement of the judgment.

MR. SOULES: Any opposition to that? That can be done by unanimity. Thank you very much. Thank you, Elaine, for your work on this.

The subject -- we're looking at the re-write then of 47(b), divided into two paragraphs that we've talked about earlier and voted on. I believe that -- Elaine, does that take care of the supersedeas issues before the Committee?

PROFESSOR CARLSON: There was one other minor thing on page 141, and I'm not sure who brought this to the attention of the Committee, but it suggests that the reference in Rule 47(a) needs to properly refer to Rule 41 as opposed to 40.

PROFESSOR DORSANEO: That's right.

MR. SOULES: Is that right?

JUSTICE HECHT: We've already done that.

MR. SOULES: Let's see if we did that already. Yes, we did. That's on page 93 and done. Is that the way you understood, Judge?

JUSTICE HECHT: That's right.

PROFESSOR CARLSON: All right.

MR. SOULES: Does that take care then of the supersedeas report, Elaine?

PROFESSOR CARLSON: Yes.

MR. SOULES: That gets back to you on review of your text on 47 a little bit later, 47(b).

Let's see. I guess the next item is TRAP Rule 40, and that will be found on page 175. This was the big job that as I remember -- Rusty, do you have a report on one side?

MR. MCMAINS: There has been a fortunate intervening occurrence. The Supreme Court has said more or less what we

thought the rules said with regard to two parties, that there is no necessity to independently perfect appeal in two-party cases, at least as I understand generally what is supposed to have been said. It may not be totally without doubt. The real issue however which I don't believe has been really addressed in the cases the Supreme Court decided and it is the real open question at this juncture is how it is, whether we are going to allow, in essence, piggy-back appeals when you have more than two parties in the case.

I mean, there is a breaking point in my -- I discussed this with Hatchell and unfortunately time and geography has not permitted Justice McCloud and Hatchell and I to be in the same place at the same time to discuss it. But I know that Mike has had some conversation with Judge McCloud and I in turn with Mike. Mike is of the view frankly and is of the opinion and sentiment shared by Roger Townsend's letter on 175 that in essence there not be just helter skelter, everybody gets for appeal the whole judgment is up

before the court if anybody perfects.

PROFESSOR DORSANEO: I'm in favor of simple reply rather than execution.

MR. MCMAINS: Means everybody ought to be perfect an appeal. If anybody perfects an appeal ought not to be anything else. Now there is a middle ground. Ironically enough I probably am at the middle ground and that is that, and this is an example, that we have examples of those two extremes independently. The middle ground we don't have an example of as of yet. And we need to get a sense of what the committe feels ought to be the route we want to go. It makes considerable sense to me that a party that essentially wins or maybe doesn't lose too bad has a derivative claim, that is to say such contribution endemnity is a classic contribution in a standard tort case is content in which it's been addressed expressly by the court in plaintiff's account in a derivative claim situation like that if one party is not dissatisfied with the result, has a cross-claim against another party but only

really personally affected, if the result that he's obtained so far gets changed, there's much logic and policy to me would suggest that he not be required to go on appealing a judgment that he's perfectly happy with if it doesn't change.

Now, how it is that you segregate that out from any other type of cross claim in the influence you have do with a then and there in terms of being derivative claims or just specifically reference contribution or endemnity type notions, that's the drafting problem we have.

If the Committee is of the view that neither of the extremes should be taken but agrees with me that at least this one has serious problem, Roger Townsend's proposed change on 175 as I say is the extreme of letting nobody -- everybody that wants anything other than what they got in the trial court has got to appeal, which means that even if you're denied relief against for a party that you don't relieve against until somebody hits you that you have got to go ahead and appeal.

PROFESSOR DORSANEO: I don't think he means for that to mean it though.

MR. MCMAINS: That's the Townsend approach, and that's the extreme approach with regard for, and frankly Hatchell subscribes to that approach. If anybody wants any more relief, he needs to let everybody know it, because othewise you're just kind of lying behind the log filing documents, and all of a sudden something changes and you're in the soup again.

MR. SOULES: Let me see if I understand what we're going to do here agenda-wise today. Is there anything that we can act on?

MR. MCMAINS: Well, that's what I tried to get that --

MR. SOULES: It has to be written for us to act.

MR. MCMAINS: The rule on the two extremes has been written. If there is a compromise, that ain't been written.

MR. SOULES: Where are the --

PROFESSOR DORSANEO: Page 190 would be a place to look.

MR. SOULES: So we are looking at 175 and 190 on the two rules.

MR. MCMAINS: That's right. Those are the two rules.

PROFESSOR DORSANEO: I would make one adjustment on 190 based on something I think Rusty said last time. In that Paragraph 4(c) I would take out "who has been aggrieved by the judgment."

MR. SOULES: Where is that now?

PROFESSOR DORESANEO: 190(c). Rusty, do you recall why you criticized that language last time? All I can remember is that I agreed with what you said last time, and the fix is to take that language out.

MR. MCMAINS: I wasn't sure we agreed on the fix. The reason I disagreed with the language is because a party who has a "take nothing" judgment in his favor, it is not an agreed judgment, but if that changes on appeal where it becomes an

aggrieved party later on in some manner, he hasn't perfected his appeal. If he is looking to cross claim against somebody else, he's got no reason to appeal again. But all of a sudden if he's going to be back in trial court, he wants to take the other parties back with him that he had in the first place so that the aggrieved by the judgment --

MR. SOULES: The words --

MR. MCMAINS: That's where part of that problem came in, is trying to tell where you are an aggrieved by the judgment.

MR. SOULES: The words "who has been aggrieved by the judgment," those words would be dropped in what you're proposing now, Bill?

PROESSOR DORSANEO: Yes.

MR. SOULES: And it would simply say, "Any other party may seek."

PROFESSOR DORSANEO: And the idea -- and I'll tell you there's a bit more to making this one way or the other choice, from my perspective -- that has to do

with the structure of our appellate rules. Our appellate process does not contemplate cross appeals. It doesn't really structure itself for two parties being the appellant, because you have provisions for getting the record that are written with the view toward one side being the appellant who makes the request, and the other people are the appellees, and they act in response.

I have a case now that happens to be a two-party case, but I think the same problem would arise in a three-party case where there are two appellants, and it's very difficult to figure out how you go about getting the statement of facts, whether you need one, whether you need two. The Court of Appeals only wants one. One is filed. You don't know whether the other side is going to file the statement of facts within the time, so you get your own.

It just doesn't lend itself to a functional process of two appeals operating side by side, our overall scheme. I think that the Court of Appeals -- I mean the Supreme Court opinion and the companion

opinion that says we should look at this up and down the line and decide which way we're going to have it, one way or the other, the same in both courts, the Court of Appeals and the Supreme Court, makes a good deal of sense, but if we are going to have it the other way where we are going to have cross appeals, then a lot more needs to be done than just to say that somebody needs to post -- somebody else needs to post bond.

MR. MCMAINS: Right. I agree.

PROFESSOR DORSANEO: We have to change the system in a more radical, and I don't mean to use a loaded term, but in a more substantial manner. And I don't think we are equipped to do that. So without regard to an abstract question of what would be the better way to have a system, our system does not lend itself to two appellants, and I don't think it lends itself to two appellants in three-party cases any more than it does in two-party cases.

I think the simple way is to do what I've suggested. It is a simple

way, but it's not simple because it refuses to face up to problems. It just simply wants to cancel those issues out and just say, No. We're going to do it one simple way and not get involved in different levels of complexity for different types of cases, because it's not worth the trouble.

Now, the ones who would say, "Well, I want a bond to be filed by somebody else," what are they really saying to us? What are they really saying, that they want somebody else to perfect an appeal, the potential appellees who are saying they're not appellees? What do they want? Why should they be entitled to it? What harm befalls them that is of any consequence whatsoever? I don't really understand that. Perhaps Mike and Roger could enlighten me, and probably Rusty could express that point of view, but I don't think it's a problem.

MR. SOULES: How does your corrective proposal operate?

MR. MCMAINS: If anybody --

PROFESSOR DORSANEO: If

anybody appeals, then for jurisdictional purposes that case, that entire case, the case that was in the trial court is up for review. And what that is going to mean is that the appellant will file a brief and it will contain points. The appellee will file a brief. The points in the appellee's brief might affect somebody else other than the named appellant in a three-party case. That somebody else presumably would have to get notice. They would have gotten a copy perhaps of the bond. I don't know about that. I'm assuming that they would have. And certainly they would get a copy of this brief that is making a complaint against them and they would have time to take action.

MR. SOULES: Under your proposal then a party first receiving information that appellant -- relief was sought against that party --

PROFESSOR DORSANEO: Well, this appellant -- relief was sought would be on notice that maybe that judgment is going to change.

MR. SOULES: And when that

party receives that notice even if it's in a brief, that party would have an opportunity to respond and raise points on appeal; is that right?

PROFESSOR DORSANEO: I don't know if I'm expressing myself clearly enough, and I guess I have a little trouble. I'm assuming. I'm making an assumption, and this may be contrary to reality, that the bond will be provided to all of the parties who are parties in the trial court.

MR. MCMAINS: No. That is not true.

PROFESSOR DORSANEO: Maybe something needs to be done there.

MR. MCMAINS: No. I'm just saying it could be. What happens is, of course, that the bond rules authorize you to make payable either to the party against who you have the appeal, which is where some of these questions about have you listed an appeal comes in, or it can be made payable to the clerk in which case that appears to be a little bit clearer in that it's to everybody's benefit.

PROFESSOR DORSANEO: Well, I think what's the facts? The bonds are made payable to the clerk?

MR. MCMAINS: Well, that depends on who is doing it. Frankly, 75 percent of the bonds I get are made to the parties and usually not all of them -- not all of them have anything to bond. The ones that lost, that the appellant won against, he doesn't appeal against anyway. So a lot of times their names just aren't in the bond protecting it one way or the other.

JUSTICE MCCLOUD: This seems to me to be a very complex problem, and also it seemed to me that we've already heard two views from the co-chairman of this committee and one in here, and then we have sort of an inside view. We have a middle ground, and that's not really been reduced to writing, and I think it would take me two or three days to understand it if reduced to writing, so I'm not sure. What I'm suggesting is, could we table this? I'm not sure that I'm ready to vote. I don't feel adequate -- that I'm adequate at this point to really give

this the type of decision it ought to be given.

MR. SOULES: The reason that I'm struggling with the assignment is that we tabled this in May, and apparently we haven't produced much in the interrum to act on, and it is a problem we've been asked to act on. And if we don't get it done today, it probably will not be a rule that can become effective before 1992, instead of becoming effective in 1990. We are running out of time. These rules have got to be passed on by the Supreme Court of Texas, and then they go through a --

JUSTUCE MCCLOUD: I read the decision of the Supreme Court I think last week. And, you know, I read it and I thought it was rather interesting, but when I read it I didn't realize how interesting it really was. I didn't realize that this committee had been into this problem in depth. And I don't know exactly how to analyze what was said there as to what the court would say and with reference to what these people are saying here who have been studying this problem for

months.

MR. SOULES: But the chair, if the sense of the committee is to table it, that is fine. I'm trying to advance it because it's here and it's been in the file.

JUSTICE MCCLOUD: Sure. I understand.

MR. TINDALL: I really share Justice McCloud's view for a lot of reasons. I mean, before we have Bill Dorsaneo and Rusty McMains and Mike Hatchell and Roger Townsend, all of whom spend 100 percent of their time on appellate work working with these rules, and what I would like is a recommendation from them. All we're hearing is this view and middle ground and another view, and I'm not sure we can resolve that today when they can't even resolve it among themselves, and they spend all their time working with this rule.

JUSTICE MCCLOUD: The thing that keeps bothering me is I hear these experts speak, and they are experts. But each one of them says, "This is a simplistic view,"

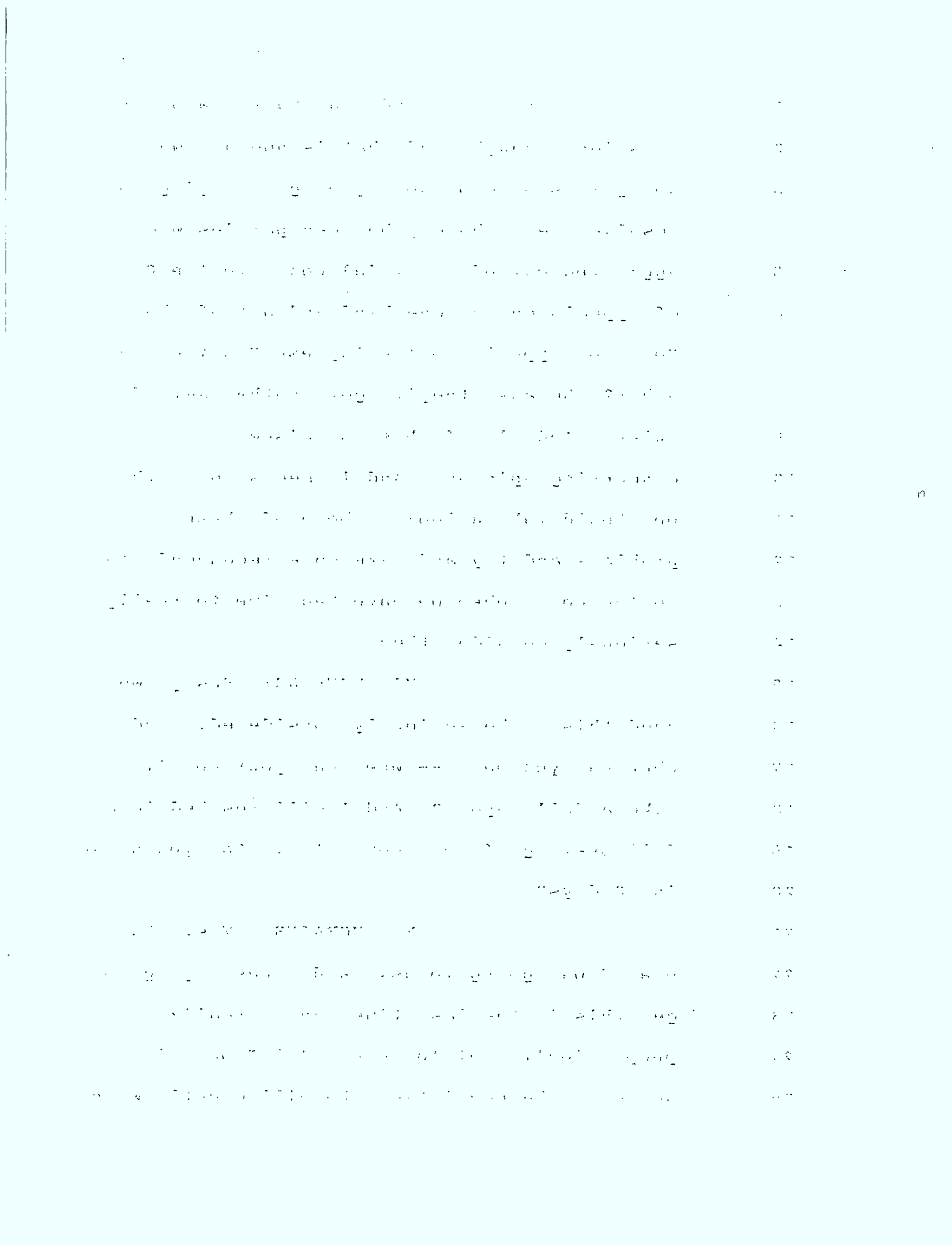
and then all of a sudden he starts creating very complex problems out here that are going to result from this simplistic view, and that bothers me a lot, because normally I would immediately say I like the simplistic view and would move certainly in that direction, but then all of a sudden I start seeing problems that you just mentioned that I hadn't even thought about.

PROFESSOR EDGAR: At least the court in its opinions a couple of weeks ago -- I've forgotten when it was -- cured the problem of the -- that has arisen among some of the courts of appeals concerning the two-party situation. Now, admittedly in the multi-party situation that problem still persists, and that gives rise to the problem that Rusty has raised and that Bill is struggling with. I share David and Judge McCloud's concern that this is a complicated subject; in fact, the concurring opinion in that case by Justice Ray Hecht and I've forgotten, somebody else, recognized that it was a complex subject; and I don't think we can solve it today.

And that raises another question, though; and that is how are we going -- should we do anything in trying to resolve the dichotomy between parties who are aggrieved out of the trial court to the Court of Appeals on the one hand and out of the Court of Appeals to the Supreme Court on the other? Because they've got another set of rules. And all of this is raised in concurring opinion. And it seems to me that we should take a look at both of these problems and try and make some recommendation to the court when we have had time to really seriously consider them.

MR. MCMAINS: Rusty, we need this to be seriously considered. And when can you make -- when can your committee make a full report? And I will reschedule a full meeting of this committee. Can you do so in 30 days?

MR. MCMAINS: Yes. But what I was going to ask, and I was trying to get this in the last time, and I realize people don't want to vote. All I want is a sense of the committee. We will wrestle with



these problems, or maybe what I need is actually a sense of the Supreme Court. If Justice Hecht wants to report back to me.

The real question is, do you want people who are really -- you know, this is the question: Do you want the whole case up there with these things being made by court points, or do you want to know what the position is going to be having been pretty well established before you get to the appellate court? That's the critical issue to this is who is going to be fighting who depending upon what happens later on?

MR. SOULES: Let me see if I understand maybe the differences. One would be that any party contemplating an appeal even if it's conditional on something that may happen in the future, but if the party at the conclusion of the trial contemplates an appeal either absolutely or in the event something else is done by one of the other parties in the trial court, do we put those parties to independent perfection of appeal from the outset? That's one side of it, isn't it?

MR. MCMAINS: Yes.

MR. SOULES: And then the other side is, do we not do that and let, I guess, everybody keep their options open until someone perfects an appeal and shows what that someone is going to appeal? And then as the appeal progresses and the issues on appeal become defined, other parties then make their decision whether to appeal, and can do so regardless of a separate earlier perfection of appeal.

MR. MCMAINS: Yes.

MR. SOULES: That's the contrast of the two positions, isn't it?

MR. MCMAINS: Yes. I mean, there is very much divergency of path.

MR. SOULES: I'm going to call the first one "independent perfection of appeal" and the other "cross points without independent perfection." Are those terms -- will they work for purposes of consensus? Let me derive that first.

MR. MCMAINS: There is kind of a third route, but that's the in-between. There are some cases --

MR. SOULES: Then between

those let me take a straw vote. Then we'll overlay the next one to see if we think that's a better. Trying to get something that we'll have before the Committee. Okay, John.

MR. O'QUINN: If you had a subcommittee look at it, will somebody tell me whether the subcommittee tended to lean towards one option or the other or all broken down, no real consensus?

PROFESSOR DORSANEO: There's not going to be a consensus. We're going to come back, and it's going to be the same. One group of appellate lawyers thinks it ought to be this way, and another group thinks it ought to be the other way, and then somebody thinks maybe there's some other way.

MR. SOULES: How many feel that every party should be required from the outset in the times provided by the rules to perfect an independent appeal or waive appeal regardless of what subsequently happens in the case on appeal?

MR. O'QUINN: What does "perfect" mean? File a bond?

MR. SOULES: Your own

bond. Just like the rules say, perfection of appeal. How many feel that should be the law? How many feel on the other hand that it would be better and since we're going to have a third position I'm not going to vote to rule that out yet, how many feel it would be better to give parties in the trial court in effect if one party perfects an appeal, that other parties can assert their points on appeal later wihout having perfected initially their appeal? How many feel that should be the law?

JUSTICE MCCLOUD: In the simple case I sure feel that way. It's just the complex case.

MR. SOULES: 14 voted in favor of that and none voted in favor of the first proposition. Now, what is the other one?

MR. MCMAINS: As I say, as Judge McCloud noted, I think the sense of the Committee is that in most cases they would like to post on the election, and I don't disagree. There is no real sentiment against that, but there are some cases where it seems to be unfair, and that's where the question is

can we draw middle ground?

MR. SOULES: So in some cases it's unfair for everyone to be able to piggy-back on the initial perfection.

PROFESSOR DORSANEO: Somewhat.

MR. MCMAINS: Right.

MR. SOULES: But in most cases it's unfair -- becomes unfair not to let someone piggy-back because they were only conditionally considering appeal.

MR. MCMAINS: Let me crystallize --

MR. SOULES: So isn't that what we're really trying to do, is resolve the most unfair situation even if it leaves something slightly unfair in a few cases?

MR. O'QUINN: We can handle slight unfairness.

MR. MCMAINS: No. The other ground is really that you can tackle the limitation of appeal rules perhaps more directly by allowing a broader limitation of the appeal than is now allowed. That's how you basically will attack on the third ground,

and that is to say basically that if the party who really wants to appeal says, "I want to appeal as the Party A," right now you can't even do that if the other claims are not severable, and so you can broaden perhaps consistent with the federal practice the ability to limit the appeal as to the claims between A and B and leave Party C out of it. You can eliminate. That gives you the notice thing. It does put you on notice that you've got to go ahead and go up if you want to complain about something as to somebody else.

That will solve the contribution stuff and some of the other things that otherwise people were coming up on and are getting embroiled in the situation of whether or not they have managed to perfect the appeal and say, "Well, I didn't know I had a complaint. I didn't know I had to."

That's just an alteration giving more power to limiting people and that also brings in it the question of should the courts have more power to deal with the case on a piecemeal basis, which is a fairly fundamental change.

MR. SOULES: Okay. Question, Rusty. Is that -- if everyone gets the right to assert their appellate points as a result of the perfection of appeal by one party you're saying that if that's the case an appealing party should have broad powers to limit the appeal so as to keep that from occurring?

MR. MCMAINS: What I'm saying is that answers the question of whether or not you have to perfect the appeal in the other case. The question is though and it can go further, is should there be a greater power to limit the appeal? I mean, let's suppose for instance --

MR. SOULES: Let Hadley speak to that, and then we'll take a consensus on it.

PROFESSOR EDGAR: This brings up what I wanted to say. Basically I'm inclined towards Bill's view that I think we ought to do everything we can to keep the appeal as simple as possible, and it might be that Rusty's concern might fit as well, but I'm concerned about whether or not trying to

articulate Rusty's proposal would unduly complicate the process; and therefore, I would like to see a proposal come forward so that we can sit down and actually look at what Rusty is proposing as an alternative, along with what I presume to be the Committee's view that we ought to keep it simple, which is Bill's proposal, and we could have both of them side by side and study them, and therefore we can go on to something else today, because I think this is really a little too complicated for us to try and discuss in the abstract.

MR. SOULES: Let me get a consensus. If the right to appeal was broadened so that each party in the trial court could ride on the perfection of appeal by a single party, how many feel that it would also be a good idea to give broader powers to that appellant to attempt to limit the appeal? One, two, three (counting).

PROFESSOR EDGAR: I can't vote on that. I want to see what it looks like, and I want to see how the practitioner can interpret it and use it, because it might not be functional.

MR. SOULES: Anybody can not vote that doesn't want to vote. I want to get a consensus so that I can try to give the Committee some guidance, if we are going to broaden, who gets to ride the single perfection of appeal. We also want them to work on given that single perfecter some additional horsepower to try to contain that appeal if it wants to; and then, of course, anybody else that perfects an appeal, I guess they're the basis of the effort to limit of course then that brings everybody in anyway, because any total perfection of the appeal perfects the appeal as to the total case.

How many feel that a single appellant, first appellant upon attempting to limit appeal should be given much latitude as compared to other parties to try to limit that appeal? Six.

How many feel otherwise? Three.

So write something that would also give that power. If I can get your attention to two rules that are here now. One is 46(d), which is the notice of filing of the

cost bond. I did not realize until this discussion that that notice could be limited, and what I'm going --

MR. MCMAINS: It's not supposed to. But there are some cases that have not been overruled.

MR. SOULES: That's what I'm trying to fix right now. In the fourth line of the text of the rule it says, "by mailing a copy thereof to counsel of record or each party other than the appellant." And since there seems to be some question about who the counsel of record are and each party other than the appellant, insert after the words "counsel of record," "in the trial court" and then after "or each party other than the appellant," "in the trial court" so that we're talking about every party in the trial court gets notice of the cost bonds.

MR. MCMAINS: Right.

MR. SOULES: Any objection to that? Now, the next thing -- and I guess this is just not on the agenda. I'm just trying to -- I didn't realize there was a problem, but those amendments would be made to

Rule 46(d) just to say that we are talking about notice to all. Every party in the trial court gets notice of cost bond. Now that's unanimously recommended then.

Then over in 40, Rule 40, this is 40(a)4, Notice of Limitation of Appeal, again amending that to make it clear that the notice of limited appeal is to be given to all parties in the trial court so that --

PROFESSOR EDGAR: Where are you going to include?

MR. SOULES: Well, I was going to put it, "not attempt to limit the scope of appeal shall be effective as to a party adverse to the appellant unless several portion of judgment from the appeal is taken and is designated and notice served." And it says "served on the adverse party." And that's not really what we want.

PROFESSOR DORSANEO: In my draft.

MR. SOULES: Well, but it does in the Rules today.

PROFESSOR DORSANEO: I

know.

MR. SOULES: So not "served on the adverse party," but "served on all other parties in the trial court."

PROFESSOR DORSANEO: Please look at page 190 and see the text of that and the draft of that.

MR. SOULES: We are not going to pass on that today. I'm just trying to get notice done today unless you-all are going to pass on that today. Any objection to deleting "served on the adverse" -- the words "on the adverse party" and inserting "all other parties in the trial court"? That will be unanimously recommended to the Supreme Court for a change in Rule 40(a)4.

So now we are going to have notice of limited appeal and notice of the cost bond going to all parties in the trial court. You can then springboard in your work knowing that all parties in the trial court are going to be given notice. The Rules at least are going to require it.

Now, can we advance work on Rule 40 any further today than what we've

done? I get the consensus then it is to permit all parties to raise points based on a single general perfection of appeal, but to give a party perfecting an appeal broad rights to attempt to limit that appeal to the extent fair to other parties? Is that the consensus of the committee?

MR. BECK: I don't think the last part is the consensus of the committee, because I think you had a majority of the committee not voting.

PROFESSOR EDGAR: I want to see both of them in writing, Luke, before I think I can effectively --

MR. SOULES: All right. The consensus of the committee is that we would like to see drafting along those lines for the next meeting. Is that the consensus of the committee? Anyone opposed to that?

Okay. That's the drafting that we want to see. We will if you can check your calendar during the noon hour, we will meet again on that one -- I guess, just on that unless something else shows up in the interim, and it will be sometime in August.

If we don't get it to the Supreme Court by August, they can't get it to the Bar Journal and get it passed. Okay. Now, the next point is -- again, it will be a day in August beyond 30 days, because Rusty says he can get the work done and to this committee within 30 days. So it will be sometime around the 15th of August, I guess, unless this committee -- I'll get your views on a day in August after the 15th.

(At this time there was a brief recess, after which time the hearing continued as follows:)

MR. SOULES: Report on TRAP Rule 51 and 53, let's see, those will be found on 210.

MR. MCMAINS: These are not really controversial. Sarah had proposed, and they're not controversial among the committee anyway. One is the written designation basically shouldn't be an excuse for the clerk not preparing the transcript as it's required to be done under the Rule. So all this is, is making clear that the failure to make the designation doesn't relieve the

clerk of the obligation to prepare the transcript, which is why we made the transcript the duty of the clerk to prepare in the first place.

MR. SOULES: How many in favor of the change to proposed Rule 51(b)? Those opposed? That will be unanimously recommended to the Supreme Court.

MR. MCMAINS: 53(a) is to say -- is to deal with this bizarre situation occurring in the San Antonio court where basically the record was ready in time to file but hadn't been requested prior to the perfection of the appeal either because they filed the bond early or because it wasn't a long record. They didn't have any trouble getting it done. And the court still held that somehow that there was a problem in the fact that they even though they had the record to file in time, having not requested it in time, that the failure to request it in time was some problem, which is perfectly silly from most of our perspectives and has since been backed off of, I might add. But nonetheless there may be some confusion, and

the underlying suggested language merely says failure to timely request shall not preclude you from filing it within the time seems to be perfectly the intent of everybody; and I move its adoption as well.

MR. SOULES: Discussion? All in favor say, "aye."

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? That's unanimously approved.

JUSTICE HECHT: Luke, I have one other matter.

MR. SOULES: Yes, sir, Justice Hecht.

JUSTICE HECHT: On Rule 51 I can't seem to find my notes, but Justice Kilgarlin, I believe, made a note of a case involving the first sentence of 51(c), and I have forgotten -- I don't have the case here, and I can't seem to put my finger on it. In the first sentence of 51(c) I believe the phrase "designated by the appellant" is mislocated in the sentence. It says, "Upon perfection of the appeal the clerk of the trial court shall prepare under his hand and

seal and to the court immediately transmit the transcript to the appellate court designated by the appellant." So one party took the position in a case on appeal that they could designate the court of appeals that this was going to.

MR. MCMAINS: We did do that.

PROFESSOR EDGAR: That was the intent I think.

MR. MCMAINS: Pick your own judge.

MR. SOULES: Sounds like we slided that one by.

PROFESSOR DORSANEO: That was the intent. Concurrent jurisdictions. That was, yes.

JUDGE BEARD: Bryan has got three Courts of Appeal.

JUSTICE HECHT: Designated by the appellant? There's an appellate case that says they're not going to let you do that.

MR. MCMAINS: Who said that?

JUSTICE HECHT: Well, not Houston or Dallas or San Antonio.

MR. MCMAINS: Bryan goes to Waco or Houston. There are several that go to several -- can go to several different courts, and the historic practice of course when you filed the transcript was you'd go take it to any court you want that had jurisdiction and file it. Now the modern practice at least in Houston and as I understand Bryan is that they just draw a bean out or whatever and that's where you go, go on a rotating basis. That's what they do, because they get to file the transcript. There isn't a rule. They just do it randomly.

PROFESSOR DORSANEO: There is a rule. It says, "designated by the appellant."

MR. MCMAINS: No. You find that.

MR. SOULES: Hold on. Justice Hecht is suggesting that there is an appellate opinion that says that the appellant is not going to get the benefit of this rule.

JUSTICE HECHT: That's

true.

MR. SOULES: Is that a Supreme Court case?

JUSTICE HECHT: No. Judge Kilgarlin sent it up maybe a year or so ago, but I don't remember.

MR. SOULES: Let me see if I can find it in our previous agenda. While we are looking for it let's discuss --

JUSTICE MCCLOUD: Let me just say one thing. This has always bothered me a lot, but I'm not going to get into that battle. I got into this battle 15 years ago. It's going to stay dead. But we're putting -- we are telling this clerk who frequently doesn't -- particularly in the rural areas doesn't know all that much about what's going on. We're telling the clerk that the clerk has the responsibility to do this and to do it timely and immediately and et cetera and so forth. Well, if we have all that much confidence in the clerk we might say that instead of saying "the transcript to the appellate court designated by the appellant." Maybe to say "to the proper appellate court."

I mean, if that's of some concern about "designated by the appellant" --

JUSTICE HECHT: Well, it's in the old agenda at page 259, and the case is Cole against the State of Texas. Per curiam opinion of the Waco court, isn't it? No.

MR. SOULES: It's the First District.

JUSTICE HECHT: Yes.

MR. MCMAINS: Did we vote it down the last time?

MR. SOULES: No, Rusty. It wasn't reported on, I don't think.

MR. MCMAINS: Did we just forget it?

MR. SOULES: What's that?

MR. MCMAINS: Did we just forget it?

MR. SOULES: Yeah, I think so.

MR. MCMAINS: I just didn't remember it being in there at all.

MR. SOULES: It was forwarded to --

MR. MCMAINS: I didn't report on it.

MR. SOULES: It was forward to the TRAP subcommittee in May of 1988.

MR. MCMAINS: Yeah. I'm just saying I don't remember reporting on it.

MR. SOULES: No, it was not reported on. The First Court held that Brazos County being uniquely situated in three appellate districts, the clerk's having sent the transcript I guess to the court next on rotation after having been directed to send it to a different court, that the clerk in effect had done the right thing and the appellant was not going to be given the relief that the appellant wanted, which was to transfer from the I guess 1st Court of Appeals to the 10th Court of Appeals. It says the designation language found does not empower the appellant to choose his court. Under the appellant's logic it would give Brazos County appellants but no others in Texas the right to forum shop, and that's not the intent of the rule, and Justices Warren, Duggin and Levi so ruled

per curiam.

Apparently the discussion here is that that was the intent of the rule to permit an appellate to pick his court because previously the appellant carried his own transcript to the clerk and could make any turn in the road he chose.

MR. BEARD: I think in Bryan they still pick their courts and the clerk sends it wherever they send it.

MR. MCCLOUD: Wherever the appellant requests is where it goes?

MR. BEARD: It's my understanding.

(Inaudible).

MR. SOULES: Wait a minute. The court reporter cannot get discussion that's not one at a time, and I apologize for interrupting.

What is the sense of the committee on this rule, proposed rule to change in 51(c) to I guess delete the language?

JUSTICE MCCLOUD: Just say "to the appellate court."

MR. MCMAINS: If you just stopped with "appellate court."

PROFESSOR EDGAR: Just put a period there.

JUSTICE MCCLOUD: "To the appellate court."

MR. SOULES: "To the appellate court," and take out "designated by the appellant."

MR. BISHOP: You can transfer that language right after trancript, "transcript designated by the appellant."

MR. SOULES: Right. But you have transcript designation by multiple parties.

MR. MCMAINS: Not really. I'm reasonably confident that was to be preserved.

MR. SOULES: All right. Discussion on deleting from at the end of the first sentence of 51(c) these words, "designated by the appellant," and then placing a period after the word "court"? Any discussion?

PROFESSOR DORSANEO:

Judge, does that opinion say what would happen or what the decisionmaker who decides in the case of concurrent jurisdiction where the case would be docketed?

JUSTICE HECHT: There's a statute on the two Houston courts, and I don't know --

MR. MCMAINS: There is no statute.

JUSTICE HECHT: -- what the procedure is in Van Zandt county, half of Dallas and half of Texarkana and Tyler.

PROFESSOR DORSANEO: My biggest concern would be that if I had to choose between all of the persons who could decide this question, I might not choose the appellant, but I certainly wouldn't choose the clerk.

JUSTICE HECHT: Well, the statute pertaining to Houston provides for random selection.

MR. MCMAINS: Right.

JUSTICE HECHT: Which is conducted by the clerk.

MR. BEARD: We don't have

any statute telling the clerk of Brazos County what to do.

JUSTICE HECHT: Right.

MR. BEARD: I concur with Bill.

MR. MCMAINS: You can insert a sentence requiring random selection in cases where a current jurisdiction if you're concerned, and that's something that is going on and nobody knows anything about.

MR. SOULES: That to me if you're going to take away from an appellant the right to choose his court, which he had before these TRAP rules were ever adopted and the change in the way the transcript is handled, if you're going to take that away, then we need to put in how the clerk is to handle it, and I don't know of any way other than random sampling. I don't say we should take it away, but if we're going to delete that language, we should probably write something that the appellate districts and whatever, something "where there's concurrent jurisdiction, the court shall send the cases to the courts on a random sample basis."

I don't know exactly what words to use. Somebody could write them up while we are working here. I guess don't we need to do one or the other, either leave it up to the appellant or instruct the clerk to random select?

MR. MCMAINS: If we want to do it that way, take the language out of the Houston statute and use with regard to whatever the random selection.

MR. SOULES: Do we have that statutory text anywhere?

JUSTICE HECHT: Unless changes.

MR. SOULES: Is it in here (indicating)?

JUSTICE MCCLOUD: Luke, let me and you. It would occur to me that if you have these counties or these jurisdictions where they can choose or they go to different courts, I'm not familiar with that, but -- I mean, I know it happens, but I don't know the mechanics of it. I can't conceive they don't have some -- that each of those courts must have some sort of statutory provision set up.

MR. SOULES: No, they don't.

JUSTICE MCCLOUD: They don't?

MR. SOULES: They don't. Here's what the statute in Houston says. So Rusty, what we're going to vote on I guess for the moment is leave it the way it is or take the choice from the appellant and do it as in Houston, and this is what the government code provides for Houston. "The trial clerk shall write the numbers of the two courts of appeals on an identical slips of paper and place the slips in a container. When a notice of appeal or appeal bond is filed, the trial court clerk shall draw a number from the container at random in a public place and shall assign the case and any companion cases to the Court of Appeals for the corresponding number drawn." So we have can either use that language or leave it the way it is.

How many feel that we should use this language?

PROFESSOR EDGAR: Can you simpify that language a little bit? Can't we

just say in the event of concurrent appellate jurisdiction that the clerk shall use a random selection or something like that?

MR. SOULES: Why not tell them exactly how to do it?

MR. FULLER: I was going to say, one guy's random --

MR. MCMAINS: Yeah, but there's three.

MR. SOULES: Okay. We can say "several." It doesn't have to be two, write number on several courts of appeals.

Okay. Those in favor of leaving it the way it is --

JUSTICE CLINTON: Wait just a minute there. This is a criminal case I've now learned, and I do not want to hasten into this. I have some recollection and I've tried to look here through the rules but can't find it that there either used to be or still is a requirement that when the appellant gives his notice of appeal he specifies the court to which he's going to appeal, and I don't want to rush through here and somehow go afoul of that. Now, that may have been changed when

the new rules were adopted. They may have dropped that specification, but that used to be the way it was. And if the notice wasn't specified, the court wasn't specified, the notice of appeal wasn't any good.

MR. FULLER: Just in criminal cases?

JUDGE CLINTON: Yeah. That's what I said. The whole preface was on the fact that this was a criminal case, so that then in turn relates to this business about designated by the appellant. It's not the appellant that's designated the transcript go there. It's the appellant designated to which court he was appealing, and that was a prerequisite in the past. Don't you have some recollection of that?

MR. BEARD: I think on every notice of appeal I've seen, it designated the court.

JUSTICE MCCLOUD: Both civil and criminal, bond, too.

JUSTICE CLINTON: I don't know about that. I'm just talking about the criminal aspect of it.

JUSTICE MCCLOUD: I think we better leave this alone.

MR. SOULES: Maybe we should. That's a position that we're going to vote on. Is there a notice of appeal in criminal cases?

JUSTICE CLINTON: Of course. Oh, God, jurisdiction. That's exactly why I'm raising this question.

MR. SOULES: Where is that, judge? What rule of evidence?

JUSTICE CLINTON: I don't know if it's in the rule here. It's damn sure in all the case law and everything else.

MR. BEARD: Your notice of appeal, that designates the court that you're appealing to as a routine matter.

JUSTICE CLINTON: Don't misunderstand. I'm not saying ultimately, you know, there might not be something to do here. But all I'm saying is right now at this very moment it raises an alarm and I'd like be able to cut the alarm off before we go any farther.

MR. SOULES: The content

of notice of appeal in criminal cases is in 40, small (b).

JUSTICE CLINTON: That's right. It says notice will be in writing and all like that. But what I'm trying to tell you is that either it is still a rule of decision or isn't, and I don't know. That the notice must specify the court to which you intend to take the appeal.

JUSTICE MCCLOUD: Yeah, because they send like to our court. That's the first thing we get in a criminal case is the notice of appeal which is sent after the trial and physically sent to our court. I mean, we get word that notice of appeal has been filed, that they give notice, they're going to appeal to the 11th Court of Appeals, and that's when everything starts ticking as far as the criminal side is concerned.

MR. SOULES: And then this case goes to the 11th?

JUSTICE MCCLOUD: It goes to the 11th.

MR. SOULES: It is I guess the legal judgment of this committee and

Justice Clinton that that case probably on that point is incorrect.

JUSTICE CLINTON: I haven't even reviewed it. I'm not going to say one way or another.

MR. BEARD: The form book says where you appeal it.

MR. SOULES: But you can say it and yet you don't get it.

MR. BEARD: You may not get it.

MR. MCMAINS: That Rule 40(b) does say on there, it says the clerk of the trial court shall note on top of the notice of the appeal the number of the cause and the day it's filed and shall immediately send one copy to the clerk of the appropriate Court of Appeals, I mean, as if there is an appropriate court of appeals.

JUSTICE CLINTON: Up until this rule was adopted the appropriate court was the one designated by the appellant.

MR. MCMAINS: I know. That's what I'm saying. I'm concerned that maybe that didn't change, because this is the

clerk of the trial court. He's got to know where to send it right now.

MR. SOULES: How many feel that 51(c) should be changed in any manner in response to the Cole case or Judge Kilgarlin's observations or for any other reason? How many feel that 51(c) should be left alone as it is? That's unanimous.

The unanimous vote of this committee is to leave TRAP 51(c) exactly as it is, and the minutes will so reflect.

(At this time there was lunch recess, after which time the hearing continued as follows:)

MR. SOULES: Resume. All right. Maybe we can do it. It would probably be easier to get with fewer here. How many can meet on August the 12th? August the 12th, that's not quite 30.

MR. MCMAINS: What day is it?

MR. SOULES: It's Saturday.

MR. MCMAINES: Okay.

MR. SOULES: Saturday,

August the 12th. Any objection to Saturday, August the 12th?

MR. TINDALL: One day only.

MR. SOULES: One day only. Probably one morning. It's just going to be on this one topic. It may take a while. Well, I think Justice Hecht may have some other agenda. Okay. Saturday, August the 12th 8:30 to 6:30. There being no objection, that will be the date and time of our next meeting.

Let's see. Rusty, let's just skip 52, since that's Hadley's rule and go to 82 and come back to 52 so he can address that. TRAP 82 -- Hadley, you want to make some comments, don't you, on TRAP 52? That's your -- isn't that your suggestion?

PROFESSOR EDGAR: I'm sure I have some comments to make. What page is it on?

MR. SOULES: Hadley, it's on 221. And we're told that it's your suggestion.

PROFESSOR EDGAR: 299, all

right.

MR. SOULES: No. TRAP 52.

MR. MCMAINS: Page 222 is your letter.

MR. SOULES: 299, 52.

PROFESSOR EDGAR: All right.

MR. SOULES: Shouldn't these all be taken together?

PROFESSOR EDGAR: They really should. Do you want to look at all of them?

MR. SOULES: Let's look at them together if they relate.

PROFESSOR EDGAR: All right. Let me back up.

MR. SOULES: Okay. Get the page numbers, and maybe we could get our --

PROFESSOR EDGAR: Let me make some preliminary statements first, if I might.

MR. SOULES: Okay. Sure.

PROFESSOR EDGAR: At the Appellate Advocacy Seminar in Corpus Christi

several weeks ago Richard Orsinger made a talk that pointed out some problems that we frankly had not considered when we recommended the changes to Rule 299 that we adopted at our last meeting concerning bench trials. And in the process of talking -- and then at the bar convention I went by Richard's office and visited with him; and it is as a result of that meeting with him that we recommended that the Rule 299 might be changed a little bit and that we include a new Rule 299(a). That also requires that we do something with Appellate Rule 52, so you need to look at all three of them at the same time. And because of the short time fuse under which we were working I simply went by your office and left these for Holly to include in our agenda.

Now, after I've said that, let me say that I really haven't had a chance to think about them since that time, but so let's just start with Rule 299 and 299(a).

MR. SOULES: All right. The pages on these, you need to put one mark in at 342 and one mark in at 221. The TRAP Rule is on 221, and the Rules of Civil

Procedure are on pages 342 through 345. 342, page 342 and page 221.

PROFESSOR EDGAR: Okay. Part of the problem that confronts many lawyers who engage in bench trials, and this certainly involves most lawyers involved in domestic cases, are the types of situations where the trial judge sometime includes findings of fact in the judgment, and those findings of fact may conflict with or be separate and distinct from findings of fact which are in the conventional findings of fact under Rule 297 through 299, and what Rules 299 as we see here on page 342 and 299(a) on page 344 do is attempt to deal with that problem.

299 provides that if we have a situation in which no element of a ground of recovery or defense has been included in findings of fact, for example, the judgment may not be supported on appeal by a presumption of finding upon any ground of recovery or defense no element of which has been included in the findings of fact, but when one or more elements has been found so and so and so forth which kind of tracks our

jury trial rules, and so we've felt that that needed to be included to make it clear that you are pretty well tracking the same implied finding rule that we have in jury trial.

All right. And this is simply a matter of philosphy which Richard and I agreed upon, and others here might disagree; and this is Rule 299(a). "Findings of fact and conclusions of law shall be filed with the clerk as a document or documents separate and apart from the judgment. Upon appeal if there is a conflict between the judgment and any findings of fact and conclusions of law, the findings and conclusions will control."

There are some intermediate appellate court decisions which conflict with one another on that ground. The reason for that is that under Rule 306 or 306(a) -- I've forgotten which -- up until about 10 years ago there was a reference in those rules to findings of fact, and it literally said that the judgment should be supported by among other things, findings of fact. Some of the intermediate courts even though that term was excised from the rules

several years ago continue to recognize that findings of fact in the judgment may control over findings of fact which are under -- which have been filed under Rule 297 and 299, conflicts in some cases; and one of the purposes of 299(a) is to attempt to eliminate that conflict among the decisions.

JUSTICE MCCLOUD: I have one question as far as the language. You know, immediately it bothers me when you say, "upon appeal if there's a conflict between the judgment" as opposed to saying "a conflict between findings of fact and conclusions of law contained in the judgment." If I just picked that up and I said "if there's a conflict between a judgment, findings of fact and conclusions of law," that the findings of fact and conclusions of law would control.

MR. SOULES: For all things. Not just on appeal.

JUSTICE MCCLOUD: That would bother me. The fact 299(a) and 299, of course, is talking about, strictly about findings of fact someone reading that may not not know that you're talking about that

particular trial judge who improperly in my opinion puts his findings of fact in the judgment. You see, it's separate and apart from the judgment. That bothers me.

PROFESSOR EDGAR: Conflict between findings contained in the judgment and any findings of fact and conclusions of law.

JUSTICE MCCLOUD: Yeah. I just wouldn't want it to say if some findings of fact and that conflict with a judgment that may not even have any findings of fact in it, that the findings of fact would control. I think we do not need get into that problem.

MR. BECK: Hadley, what if the trail judge doesn't put in it in the judgment, writes a short opinion or writes a letter for the letters saying that is the basis for decision and includes facts there?

PROFESSOR EDGAR: I don't know.

MR. BECK: They're not necessarily always put in the judgment. I know judges write letters saying, "This is my ruling and this is the basis."

MR. BISHOP: Trial judge's

actual written opinion.

JUSTICE MCCLOUD: As a judge on the Court of Appeals I know this, David: We have taken the position if the trial judge has written you a letter that has several things in it, we disregard it. If it's not in a finding of fact, proper finding of fact, and there are some cases that say you can make those findings in the judgment, but just if there is a letter, it may not be right, but I know through the years historically we have just said, "That's not a finding of fact. That's a letter. He may change. We don't know why."

But I see what you're saying. You're saying if that judge puts findings of fact in a judgment, then you want -- I can't imagine one doing it both ways.

MR. EDGARD: Strange enough, those things do happen once in a while.

JUSTICE MCCLOUD: In saying if he's got findings of fact in his judgment and he's properly filed findings of

fact under the rule, then those findings of fact under the rule control.

PROFESSOR EDGAR: That was the philosophy I suggested be included in 299(a).

JUSTICE MCCLOUD: It may not be a problem. It just bothered me when I first saw it when it said the judgment findings of fact would control over a judgment. It bothered me technically hypothetically.

MR. BEARD: Findings of fact and conclusions of law made at the request of the party or this -- some of them just file everything in there.

PROFESSOR EDGAR: That's right. And that's exactly what we're trying to say, that where a party goes through the process of having the court recite findings of fact and conclusions of law, then those findings of fact and conclusions of law will contain
over -- control over anything that's contrary to that judgment.

MR. SOULES: Can we

discuss that right there? As far as I'm aware, that would be the only places in the rules where if something outside the trial court's judgment controls the judgment, and Judge Casseb has probably been on the trial bench as much as anybody else in this room, and it was my understanding that the judgment was the termination of the trial by the trial judge, and that judgment controls inconsistencies elsewhere in the record and that doesn't mean there's not error in the record, but that the judgment should control and not the findings and conclusions when they're in conflict. And I think that's the threshhold problem with me with this, which does control, and I thought the judgment was the most controlling instrument in the trial court process.

PROFESSOR EDGAR: If you adopt that philosophy then, then if findings of fact can be contained in the judgment or if there are conflicts between the findings contained in the judgment and those that are individually contained in the record, where are you? You've got to have -- I mean --

MR. SOULES: One of them has got to control.

PROFESSOR EDGAR: What's the purpose of having findings of fact and conclusions of law if they're not going to control over something that's contrary somewhere else?

MR. SOULES: What's the purpose of having a judgment if it's not going to control?

JUSTICE MCCLOUD: But these things are not supposed to be in the judgment.

MR. TINDALL: Then let's put that statement in that a judgment should not contain findings of fact and conclusions of law.

PROFESSOR EDGAR: That's what the first sentence says, Harry.

MR. SOULES: This is the penalty for doing something wrong.

JUSTICE MCCLOUD: Yeah.

MR. SOULES: Your judgment doesn't control.

JUSTICE MCCLOUD: I'm not

saying it's wrong, but I mean, you have a whole procedure for making findings of fact and conclusions of law, and obviously with that procedure that contemplates that you don't put all of those things in the judgment. The judgment is just so and so wins how much money, and out here I'm going to set out why all of these findings. I may have many, many of them, and they really shouldn't be in the judgment. Most judgments, and I've seen it and probably did it, but most times when you find a trial court putting findings of fact in the judgment, they would be very few. You may find four or five little things, but I've never yet seen a judge who would do it both ways. But you're telling me it does happen, and I can see it does happen, you've got a problem. And I agree that findings of fact and conclusions of law ought to prevail as to the findings of fact that might be in the judgment, not the judgment itself insofar as what the court who rules for and anything like that.

MR. SOULES: Is it analagous to like a jury verdict, if the judge

recites in his judgment the jury questions and answers and does that wrong, the verdict still controls?

JUSTICE MCCLOUD: I'd sure think so.

MR. SOULES: Is that an analagous situation? Maybe that is the case. I don't know. I'm trying to get their thought in my thought process.

JUSTICE MCCLOUD: I think what we're trying to do here is just to take care of that situation that should never come up, but if it does, then we'd know that if he filed the proper findings of fact and conclusions of law you must base your theory of recovery upon those findings that are found properly at the request of the party it seems to me.

MR. BEARD: Luke, I think you can ignore the findings of fact in the judgment.

JUSTICE MCCLOUD: I used to think that, but you can't.

JUDGE BEARD: Otherwise that part of judgment you're going to enforce

the control.

MR. SOULES: Well, let's rewrite the second sentence. Should the sentence be in 299(a) or 299? It doesn't have anything to do with filing.

PROFESSOR EDGAR: It doesn't have anything to do with 299 either.

JUSTICE CASSEB: It sure doesn't.

PROFESSOR EDGAR: I scratched my head and tried to figure out whether I could put either one of these in one or the other rulings, but they really don't seem to fit anywhere else, because -- and we now have the amended, the rules which we passed at our last meeting. They're in here somewhere. Just a minute. I saw them earlier. Beginning on page 69. You see, Rule 296 deals with requests for findings. Rule 297 is the time to file. 298 are additional or amended findings, and then we have Rule 299 which are omitted findings, and I'm open to suggestion.

JUSTICE MCCLOUD: Let me make another point here that bothers me a

little bit. I think what we're dealing with here in 299 is this whole body of law that we have once you get into the area of findings of fact where, you know, you can only recover upon the theory that you have within your findings and things of this nature.

I know in appellate court I don't think the appellate court is bound by the court's conclusions of law. In other words, even if the court fails to find a conclusion of law or the court makes some sort of improper conclusion of law, but the finding of fact is very significant as far as the appellate level is concerned, and even if the finding of fact is improperly designated as a conclusion of law if it's truly a finding of fact.

PROFESSOR EDGAR: Rule 299 contains only the finding of fact.

JUSTICE MCCLOUD: What I was thinking about is in this 299(a) where you say, "Upon appeal if there's a conflict between the judgment and any findings of fact and conclusions of law" off the top of my head, but I'm wondering if it would be just as

effective to say if on appeal if there's a conflict between findings of fact and the judgment and any findings of fact made. It doesn't say on the record the conclusions of law part is what I'm saying.

PROFESSOR EDGAR: I don't have any problem with that personally; and again, I'm having to rely upon the fairly extensive conversation I had with Orsinger, and for some reason I feel that we concluded that that should be in there, although I certainly agree with what you said. Here we're talking about whether or not there is a conflict, not whether the appellate court can overturn a conclusion of law which it certainly has the power to do, but whether or not there is a conflict between a conclusion of law that is contained in the judgment and a conclusion of law that's contained in the conclusion of law. Which will control? And that's what this is directed to rather than the appellate review of those matters.

JUSTICE MCCLOUD: I don't think a conclusion of law makes that much difference. I hadn't thought about this, but

it seems to me a conclusion of law is out there and it enables the trial judge to render a judgment for a certain party, and I think the law is that that trial judge can completely miss the conclusion of law, but if he had findings of fact which will support the judgment for plaintiff or a judgment for the defendant even though he has incorrectly used a conclusions of law, I think it's all right, and I'm just wondering how all that fits into this.

But I see what you're concerned about, and that is the judge who does put two sets of findings of fact out there, what are you going to do, because the judgment -- it has to be supported. The theory of recovery has to be supported by findings. You have got to use one or the other, and what you're saying is, "What if they're inconsistent?"

MR. MCMAINS: If you re-draft that sentence, since you're talking about -- you're obviously trying to make reference to the first part. But if you say that if there is conflict between findings of

fact inserted in the judgment in violation of the preceding sentence and separately filed finding of fact and conclusions of law, then the separately filed finding will be deemed controlling for appellate purposes, for appellate review purposes.

Number one, taking out the issue of whether it's applicable for any other purpose, such as you know, go out and say, "Well, I can execute because this -- just for reviewing purposes," and secondly, "I think it's the conflict between a finding of fact, whatever that is, and then that -- any conceivable other finding whether it is labeled a finding of fact or conclusion of law." In other words, you don't have to put findings of fact and conclusions as condemning those in the judgment. The only thing really condemned is the findings of fact.

PROFESSOR EDGAR: That's what Justice McCloud was saying.

MR. MCMAINS: Can't you do it that way? I mean, because you're making clear that what you're trying to limit this to is situations where the judge hasn't done what

he was supposed to do.

PROFESSOR EDGAR: True.

MR. MCMAINS: Does that solve it?

PROFESSOR EDGAR: Yes. Again, the only reservation I have is that I remember we deliberated to some extent in his office about this very matter, and he convinced me that perhaps conclusions of law should be inserted; and I'm sorry. I can't recall the basis for that discussion.

MR. MCMAINS: But it's not a conflict between the judgment. It's a conflict between findings contained in the judgment. They're not supposed to be there. You're not really talking about the conflict between the judgment. You're talking about it between findings contained in the judgment.

PROFESSOR EDGAR: That point is well taken. I think that's agreed on that.

JUSTICE MCCLOUD: That's real important.

PROFESSOR EDGAR: We've agreed on that. And since I can't defend the

insertion of the conclusions of law --

JUSTICE MCCLOUD: Just leave them in there. I don't think it does any harm at all. Maybe it's the right thing.

MR. BECK: If you have an agreed party on appeal, I mean, you have to have some basis for appeal. Which conclusion of law do they attach on appeal, the one in the findings of fact and conclusions of law or the one in the judgment? The reason you want that in there is so the practitioner knows what they're going to attack.

PROFESSOR EDGAR: That's right. But the question is, should you put conclusions of law?

MR. BECK: Well, you'll be attacking conclusions of law as well as the findings of fact in some instances.

JUSTICE MCCLOUD: The judge if he has put it in his judgment, then he's probably got findings of fact and conclusions of law, and I think probably the right thing to do is leave both findings of fact and conclusions of law in there, make sure we are talking about findings within the

judgment. I wouldn't want to get into the position to say that a conclusion of law might some way conflict with a judgment, that a conclusion of law would prevail over the judgment. That's the only thing.

PROFESSOR EDGAR: I look at the judgment as who wins and what relief is to be granted.

MR. SOULES: That's true.

PROFESSOR EDGAR: And the findings of fact and conclusions of law seem to track the legal bases upon which the judgment from the trial court, so that really doesn't bother me very much.

JUSTICE MCCLOUD: It only becomes important in one sense, and that is unless there are sufficient findings on a sufficient theory to support that judgment, then the appellant can reverse it. That's the only reason it becomes important, and that has to do with findings of fact and not conclusions of law, but I think I'd leave them both in there, because if the judge -- then you're telling the appellant and the parties that if both of them are out here or either

one out here in the judgment and he later files proper findings of fact and conclusions of law, we need to only have one set, and so we're going to go with the set that properly finds according to 297, urge on appeal, not to argue conclusions of law evidence.

PROFESSOR EDGAR: I'm trying to pick up what Rusty said a minute ago. And as I reconstruct it this last sentence of 299(a), and we're not -- where we put it is another issue. But "If there is conflict between findings of fact contained in the judgment and any findings of fact and conclusions of law, the findings and conclusions will control for appellate purposes." Is that?

MR. MCMAINS: Yes.

JUDGE BEARD: Voluntary findings of fact and conclusions of law, or only those that are mandated by request?

PROFESSOR EDGAR: Well --

JUDGE BEARD: Some judges will file findings of fact and conclusions of law without being forced to do so.

PROFESSOR EDGAR: Is that

right?

JUDGE BEARD: Some judges voluntarily find findings of fact and conclusions of law. The question is, are the ones that are mandated by request or where the judge just files it? And he sometimes put letters in there that you could construe to be findings of fact and conclusions of law.

PROFESSOR EDGAR: Maybe I'm wrong. I don't think that letters that happen to wind up in the record have any part of the judgment or anything else, and I think they're complete surplus and ought to be disregarded. But if the court goes through the formality of filing findings and conclusions even though not having been requested to do so and they're filed among the papers as such, I'm not -- I would suppose they should be given the same respect and legal deference as those that had been requested by a litigant.

JUSTICE MCCLOUD: I would think so.

PROFESSOR EDGAR: We haven't purported to deal with that. I don't

guess we could deal with every conceivable --

JUDGE BEARD: Well, I've got one right now where they filed a letter and informal request for findings of fact and conclusions of law, and they're different from the letter he wrote.

PROFESSOR EDGAR: Why don't we if that is of sufficient concern to the Committee, why don't we refer then to findings of fact and conclusions of law filed pursuant to Rule 296.

MR. BECK: I don't think you ought to make that initial distinction, because suppose you have ones that are voluntarily by the judge. You're creating a whole new set of problems.

PROFESSOR EDGAR: I'm trying to talk about letters, I guess.

MR. BECK: Letters.

MR. TINDALL: Those would predate the judgment generally. Can you make a distinction between the ones that are made before and after the signing of the judgment, because you may have verbal rules from the bench, letters, docket sheets?

PROFESSOR EDGAR: Harry, Ken isn't here right now, but you deal in this area a lot. Try and help us here.

MR. TINDALL: That's what I'm saying. Anything that predates the signing of the judgment is controlled by the judgment. Anything after the signing of the judgment in the event of an inconsistency be ruled control of the judgment.

PROFESSOR EDGAR: Certainly a letter contained in the court papers even though it predates the judgment shouldn't control.

MR. TINDALL: Anything predating the judgment is controlled by the judgment. Anything signed by the judge after the judgment should govern in the event of an inconsistency whether it's voluntary like Pat said I can't foresee that in my county, but maybe it does.

HONORABLE RIVERA: Luke, I don't think we can ever qualify or limit or contain the judgment. The judgment is the order of the court, and that's it, period.

JUDGE CASSEB: Why are we

worrying about changing 299 and 298? That is to make it fit into TRAP 52? Is this what it is? Is that the reason for it?

MR. SOULES: I'm not sure. We've got -- I see a problem here that I don't think we intended. Under Rule 297 and 298, under 298 we've got a situation where a judge can make findings of fact and conclusions of law within so many days of a request, but it doesn't say that those have to be grounded on a request. And 297 though the way we've got it written, we say, "when a timely request is filed" and so forth. I think that probably needs to be fixed. If a judge can voluntarily make findings, he doesn't have to do that after a request is filed. And initial findings of fact and conclusions of law our rules as they're now written --

JUSTICE MCCLOUD: Luke, 297 orders the judge to do it. He's required to do it under 297. That's not to say he couldn't voluntarily do it.

MR. SOULES: Where does it say that, though?

JUSTICE MCCLOUD: It says, "when demand is made therefor."

MR. SOULES: What I'm talking about doing on page 70 is strike "when a timely request is filed," and just start with "the court shall make and file its findings of fact and conclusions of law within 20 days after a timely request is filed." If he makes them voluntarily he's going to make them within that time. If no request is filed, it's within that number of days, because that's the language that we have in 298, "The Court shall make and file any additional or amended findings within 10 days," and don't predicate the initial findings on a request being filed. Just give the time. He's got to do it within a number of days.

PROFESSOR EDGAR: "Within 20 days after a timely request is filed."

MR. SOULES: Yes. "The Court shall make and file its findings," that helps the language of 297, 298 fit voluntary findings.

JUSTICE MCCLOUD: We're

moving a little fast here. I want to be sure. In other words, my experience has been that maybe I've seen one time in 27 years where a judge has voluntarily filed findings of fact. I sat as a trial judge for a number of years, and I'm going to tell you that would have been absolutely the last think I would have ever done, and I don't know many -- in other words, I don't want us to mess all of this up to take care of a problem that may not exist.

MR. SOULES: This doesn't change the meaning of 297(a).

JUSTICE MCCLOUD: All right. 297, of course, is down there for the very specific purpose of requiring that trial judge, that reluctant trial judge as I was, requiring me to file those, because I can just rule for so and so, but now all of a sudden that appellant is going to say, "All right. I'm going to tie you to a theory now. I'm going to go in there and find those things, and I'll have something to argue on appeal," and he can.

Of course, the appellee

doesn't ever want any findings of fact or conclusions of law, and the appellant frequently doesn't request them, but if he does request them timely, then these rules say that trial judge has got to comply with that.

MR. SOULES: This doesn't change that.

JUSTICE MCCLOUD: This doesn't change it. That's the main problem. That's the main thing we want to have is have a handle on the trial judge who doesn't file them when timely requested.

MR. SOULES: To force them to be done within a period of time.

JUSTICE MCCLOUD: Correct.

PROFESSOR EDGAR: All right. Now, we're going to change then 297(a) on page 70 to read (a), "The court shall make and file its findings of fact and conclusions of law 20 days after a timely request is filed."

MR. SOULES: That's right.

PROFESSOR EDGAR: That's correct. Okay, now, we are going to leave 299 on page 342 as it is recommended, or I'm

trying to figuring out where we are.

MR. SOULES: That's what is proposed, yes.

PROFESSOR EDGAR: All right. Then I gather the sentiment here then is to leave this last sentence of 299(a), the new rule to read, "If there is a conflict between findings of fact contained in the judgment and any findings of fact and conclusions of law, the findings and conclusions if there is conflict between findings of fact contained in the judment in violation of this rule and any findings of fact and conclusions of law, the findings and conclusions will control for appellate purposes."

MR. SOULES: I think that gets the general concept, but let me ask this: Shouldn't we say when? We've been trying to use "when" instead of "where" or "if" in most texts. "When there is a conflict between finding of fact contained in the judgment and findings of fact," I think that should. We could say findings of fact made pursuant to Rule 297 and 298, because what --

you've got to say what kinds of findings of fact the second type are. They're not in the judgment. Where are they, 297, 298 findings? Meaning either the original findings or additional findings.

I think the conclusions of law part ought to come out. I think if you've got a conclusion of law outside the judgment, the judgment does conclude law, so we're really only talking about fact disagreement, fact finding disagreement, but that needs to be debated. I'm just running through what are my reactions to this sentence. And that's all of them. "When there is conflict between findings of fact contained in the judgment and any findings of fact made pursuant to Rule 297 and 298, the findings" --

PROFESSOR EDGAR: Latter findings.

MR. SOULES: -- "the Rule 297 and 298 findings will control for appellate purposes."

PROFESSOR EDGAR: You could say the latter finding rather than having to repeat 297 and 298.

MR. SOULES: I don't know which comes first in time and whether that might be the way that ought to be construed. I don't know.

MR. TINDALL: I think that latter findings.

MR. SOULES: The latter findings.

MR. TINDALL: So if you have these letters that predate it, anything like that it will be clear you're only talking about matters after the judgment.

MR. SOULES: So if the judgment contains findings later, then the Rule 297 and 298 findings in time, the judgment finding would control?

MR. TINDALL: Absolutely. That's the last act that we know.

JUSTICE MCCLOUD: I think a real good way to do this if we're really into this is just not -- findings of fact or conclusions of law found in the judgment just don't mean anything. Just say something like "The Court shall not make findings of fact and conclusions of law in the judgment."

PROFESSOR DORSANEO: I agree with that, because I think anything else, then you're just doing (c).

JUSTICE MCCLOUD: I don't know where you end it.

JUSTICE MCCLOUD: And then if the judge did do it and then he later came along and made findings of facts, then the Court would look at that and say, "Well, you're directed not to have found those in the judgment and you have subsequently properly found findings of fact and conclusions of law. Therefore, the latter will prevail." You don't think the Court would do that?

MR. SOULES: I think, judge, the way you've got the right about waiver all the time I think if the findings of fact are in the judgment and nobody complains, that they're going to control on appeal. There not going to be nullities.

JUSTICE MCCLOUD: They are right now.

MR. SOULES: They're not going to be ignored on appeal.

PROFESSOR EDGAR: Luke, we

are just talking about where there are findings of fact and conclusions of law. If no findings or conclusions have been requested in this, then the judgment whatever it recites is the judgment whether it contains findings of fact, contains conclusions of law. Then we don't have this problem. It's only when there's a conflict.

MR. SOULES: That's right. But not what was being said here, that we're just going to say, "Well, if you find facts in the judgment, they don't count for anything." That was something that followed up, and that's what I was trying to react to.

JUSTICE MCCLOUD: There's no provision for it. The provisions are if you want findings of fact, you're supposed to go to 297. You're supposed to make a request. It's supposed to be a separate instrument. We have got all the rules for it, and then we're saying, "Yeah, but those trial judges are not going to do it that way and so we're going to have another procedure down here to take care of all the trial judges who don't read the rule and don't do it that

way."

MR. SOULES: Try this: Start this rule with this sentence: "Findings of fact shall not be recited in a judgment," just say it.

JUSTICE MCCLOUD: Yeah.

MR. SOULES: The second sentence, "When there is a conflict between findings of fact recited in a judgment" --

PROFESSOR EDGAR: In violation of the rule.

JUSTICE MCCLOUD: I think you're getting -- I think we're solving the problem. I think trial judges will --

MR. SOULES: In violation of this rule.

PROFESSOR EDGAR: Did you say "when" or "if"?

MR. SOULES: "When."

PROFESSOR EDGAR: I'd say "if," because you don't want to say -- you're assuming there's going to be.

MR. SOULES: "If there is a conflict between findings of fact recited in a judgment in violation of this rule and any

findings of fact made pursuant to Rule 297 and 298, the Rule 297 and 298 findings will control for appellate purposes. And I'd like to move the first sentence that you've got here in 299(a) to a different place." That would be all there is, and we could rename this something else.

JUSTICE MCCLOUD: Let me tell you really why I do not like findings in the judgment, and I've thought about it for a long time, is frequently it's not well thought out. Sometimes the attorney, the winning side hasn't really looked at it that closely, and the judge or someone may just put in a couple of findings; and you've got another rule in this whole business of findings of fact and conclusions of law, and that is that that judgment has to rest upon those findings. And if there is no finding which supports that theory of recovery, then that judgment can be reversed.

So if you have got a sloppily done finding, one or two little findings up there and it may not suffice to support a theory of recovery, you could have a

problem. And that's always bugged me, because you might have a couple of findings in a judgment and somebody say, "Well, that's the findings of fact." That's fine and dandy if he has enough findings to support a theory of recovery.

MR. SOULES: Let me run it by. If we say Rule 299(a) and the caption is Findings of Fact Not to be Recited in a Judgment, that's the caption, and then the first sentence says, "Findings of fact shall not be recited in a judgment." The second sentence, "If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rule 297 and 298" --

MR. TINDALL: Subsequent to the judgment.

MR. SOULES: No. "Rule 297 and 298 findings will control for appellate purposes." That's the whole thing. It doesn't make any difference when the 297 and 298 --

MR. TINDALL: Luke change --

MR. SOULES: Just a second. I'll give you a chance to talk. But I'm telling you what I'm putting on the table is it doesn't make any difference when they're made. If they're made under 297 and 298, they control because the judgment is not supposed to have anything in there anyway.

MR. TINDALL: What is going to keep you from arguing that the letter the judge sent out was not his finding of fact and conclusions of law, the letter to the lawyer is what his ruling is if you don't make it subsequent in time, because there's all that whole body of case law that anything he does and if he puts his name on the judgment is subsumed into the judgment, and if you don't make it clear that the findings of fact that you want to control the judgment are the ones made subsequent in time, I think you're just inviting --

PROFESSOR EDGAR: But the requests aren't made in the 20-day date. The judgment is signed. Look under 297.

MR. TINDALL: I understand that.

MR. SOULES: Now, that's something that I had not tuned in on until right now because I've been listening to these other things. The point in time with 297 and 298 findings would occur if they are to be elevated to control the judgment. Should it be -- should the point in time be only if they're made after judgment that they control?

MR. TINDALL: Sure.

MR. SOULES: Harry says yes. Anyone have a contrary view?

PROFESSOR DORSANEO: The problem that you would run into, as you can see, you start with one judgment and then end up with a different judgment, and I'm kind of inclined to think that the findings should control whether they're before or after that judgment if they're really findings of fact that are in a document separate and apart from the judgment, that at least if it's --

MR. SOULES: If you're analogizing to a jury verdict which finds the facts in a jury case, the conclusions that the findings of fact by the judge are the findings

of fact in a non-jury case, then the judge enters a judgment, renders a judgment based on the facts found by the jury in advance rendition of that judgment, and I suppose if you found facts in advance of -- in a non-jury case in advance of the judgment, he should have to render, either amend those findings, or his judgment would be controlled by those findings as far as the factual basis for the judgment is concerned. If that's the case, then whether the findings are made before or after, the fact finding would still control just like a verdict would control. Just couldn't deviate from a verdict just because he may recite a conflict in the judgment.

MR. TINDALL: There are hundreds of cases where the actual judgment didn't match the docket sheet, and they went up on appeal and said, "Well, the judgment controls." And I don't think you want to get rid of that body of law.

JUSTICE MCCLOUD: If we're getting rid of that body of law, we don't want to.

MR. SOULES: Well, we're

just talking about 297, 298, findings of fact and conclusions of law. We're not talking about a docket sheet. I don't know. This is a problem that's first surfaced to me.

MR. TINDALL: Or the ruling from the bench on the record, what is that?

MR. SOULES: Well, it's not a 297 or 298 finding. It's sure not that.

PROFESSOR BLAKELY: Is your phrase in violation of this rule, you want it to modify that are conclusions in the judgment? That's what is in violation of the rules, and it seems to be slipped over and modified the fact that there's a conflict. I didn't write your words down. As close as you can to your fact that there are findings in the judgment.

MR. SOULES: I got you. The word of phrase is "conflict between findings of fact recited in the judgment in violation of this rule."

PROFESSOR BLAKELY: Well, you say. You're looking at it. You can tell.

MR. SOULES: Yes, sir.

PROFESSOR BLAKELY: It's clear to you that it modifies findings in the judgment.

MR. SOULES: It says findings of fact recited in the judgment in violation of the rule. I can't snag it much closer than that. How many feel findings of fact made before the judgment should still control the judgment? Five.

How many feel that the findings of fact made before should not control the judgment? Five. Let's vote again, because this is too important for people not to vote. Surely we have got thought processes of the Committee going.

JUSTICE MCCLOUD: I think findings of fact made pursuant to 297 control whenever they're made.

MR. SOULES: Whenever they are made. We're talking about findings of fact that are made under 297 and 298.

JUSTICE MCCLOUD: There won't be any findings of fact made prior to the judgment. That won't be done once in

5,000 years.

PROFESSOR DORSANEO: Just will be modified --

MR. TINDALL: Judge --

MR. SOULES: Just a minute. One at a time. Hadley, you had the floor, and then I'll get Harry, and then I'll get Bill. Excuse me, please. We're trying to make a record here.

PROFESSOR EDGAR: It seems to me that if the Court enters findings and conclusions and then sits down and redrafts and enters a new judgment, then what a party should do then perhaps is come back and seek additional findings and conclusions. That's what I'd do. I don't think it would be a problem.

MR. SOULES: We're talking about Rule 297 and 298 findings of fact. The formal process has been exercised and a judgment has been rendered afterwards.

JUSTICE MCCLOUD: After the finding.

MR. SOULES: After the findings of fact and conclusions of law. The

request was made before the judgment was signed, which is possible. How many feel that when that formal process has been gone through and the judge has found facts formally that those facts should control the judgment on appeal? 14.

How many feel that Rule 297 and 298 findings of fact should control a judgment only if they are made after the judgment is signed? One.

MR. MORRIS: Luke, let me tell you why. Because I think the later pronouncement by a judge should be given tremendous weight in our process. I think the last pronouncement by a judge, and I hadn't spoken out. I didn't think the vote was going to be heavy in this direction. Having a judge doing something later disregarding what his last pronouncement is seems to me like a dangerous precedent.

MR. SOULES: Let's now go to try to get the language on the table to vote. It was 14 to 1. Rusty.

MR. MCMAINS: I want to ask you this one question. Is this an attempt

to recognize that there -- to ratify a process of actually requesting findings and going through the whole process before the judgment?

JUSTICE MCCLOUD: No.

MR. MCMAINS: The reason I ask is our prematurely filed documents rule which we have deals with the efficacy of a premature request. It doesn't deal with premature findings. We don't have a rule that deals with efficacy for premature findings until right now if you make this change; and that's all I'm trying --

MR. SOULES: Okay. We are going to vote this change up or down and move on with the agenda.

MR. MORRIS: Luke, let me ask you one more thing.

MR. SOULES: Okay.

MR. MORRIS: In determine on this, how do you now have 297 worded?

PROFESSOR EDGAR: Look on page --

MR. SOULES: We have got to keep up everybody.

MR. MORRIS: But Luke has made further changes today.

PROFESSOR EDGAR: Look on page seven.

MR. SOULES: You will strike "when timely request is filed."

PROFESSOR EDGAR: Strike "when timely request is filed." Start beginning with "the Court," and then the third line will be 20 days after a timely, strike "such" and insert "a timely request." It doesn't change the meaning at all.

MR. SOULES: Okay. Now we're going to move on with this, to vote on this whether we adopt this 299(a); and I want to leave this first sentence out simply because I think we could relocate it to a better place.

The proposition that I have tried to collect here is this: Rule 299(a), caption, Findings of Fact not to be Recited in a Judgment, text, "Findings of fact shall not be recited in a judgment," first sentence. The second sentence, "If there is a conflict between findings of fact recited in a

judgment in violation of this rule and findings of fact made pursuant to Rule 297 and 298, the Rule 297 and 298 findings will control for appellate purposes." Now that's the proposition, to recommend to the Supreme Court the adoption of that rule.

Now discussions on that. Being no further discussion, those in favor of recommending those changes to the Supreme Court of Texas say aye.

ADVISORY COMMITEE: Aye.

MR. SOULES: Opposed? Let me see hands, because there is some dissent. Those in favor? 13. Those opposed? Two. Now on the first sentence --

PROFESSOR EDGAR: Luke, I've kind of looked over the other rules that we have, and they merely -- if you look at those rules that we've already adopted, this sentence really doesn't fit any of them; and I would suggest that what we do is --

MR. SOULES: If you'll put it between (a) and (b) on Rule 297 and relabel (b) to (c) it will fit, and that's --

PROFESSOR EDGAR: That's

on Page 70?

MR. SOULES: On page 70.

PROFESSOR EDGAR: Well, but Rule 297 is talking about time to make and file finding. You see. That's the way we've got it headed. This is talking about where you file it and what it's to contain. And I was going to suggest that what we do is let this first sentence be Rule 299(a) and then what we just voted on as 299(a), let that be 299(b).

MR. SOULES: Okay. Well, the reason that I thought it fit there was because the last sentence of (a) says, "The Court shall cause a copy of the findings and conclusions to be mailed to each party to the suit." And to me the next logical concept to follow that would be that the clerk shall file them separately, but it seems to fit there, but if it doesn't fit, it doesn't fit. So it sort of tells what the Court is supposed to do with its findings and conclusions. That's already in (a), and then what does the clerk do with them. But if it's your recommendation it be made a separate rule, that's fine with

me.

PROFESSOR EDGAR: I so move.

MR. BECK: Second.

MR. SOULES: The first sentence.

PROFESSOR EDGAR: First sentence, 299(a).

MR. SOULES: 299(a), "The findings of fact and conclusions of law shall be filed with the clerk of the court as a document or documents separate and apart from the judgment," period. In favor say aye.

ADVISORY COMMITEE: Aye.

MR. SOULES: Opposed? The next would be Rule 299(b), which is what we just voted on.

Okay. Hadley, now go to Rule 52.

PROFESSOR EDGAR: What page is that on?

MR. SOULES: It's on 221.

PROFESSOR EDGAR: All right. Now, in continuing my discussion with Richard Orsinger he pointed out that when you

look at Appellate Rule 52, the general rule, "In order to preserve a complaint for appellate review a party must have presented to the trial court a timely request," so on, so on and so forth.

Now, in a non-jury case what does that do to a complaint concerning factual insufficiency or against the great weight and preponderance? If you go back and look at Rule 324 of the Rules of Civil Procedure one would conclude that a motion for new trial is not required, and that's really kind of been what I've always labored under, that impression, but there are some courts that have taken the position that because of Appellate Rule 52(a) if you have not made a complaint somewhere in the trial court about factual sufficiency in a bench trial you've waived your right to complain, and I think when you look at 52(a) and completely ignore Rule 324(b) or (a) and (b) one could make that argument, although I am troubled by it.

So what I'm trying to do here and the purpose of 52(d) is to make it clear that in a non-jury case you're

complaining of factual sufficiency or against the great weight, you do not need to comply with 52(a), that is, you do not have to complain in the trial court under 52(a) in order to complain in these matters. That's the purpose of it.

MR. SOULES: All right. Why do we put in there in non-jury case? 329 --

JUSTICE MCCLOUD: It says that in there.

MR. SOULES: Rule 324(a) says appoint in a motion for new trial if not a prerequisite to complain on appeal, either a jury or a non-jury case and so forth.

PROFESSOR EDGAR: That's right.

MR. SOULES: Why shouldn't this rule be both jury and non-jury.

MR. MCMAINS: Because it's different. Because the (b) sections do require motion for new trial.

JUSTICE MCCLOUD: 224(b) requires a motion for new trial on factual insufficiency, greater weight and

preponderance. And all we're trying to say here is we're trying to eliminate the apparent confusion between 324 and Appellate Rule 52(a). That's what it's for.

MR. SOULES: Thank you, Hadley. Now I understand.

JUSTICE MCCLOUD: I don't quite follow that. You said 324 requires a motion for new trial?

PROFESSOR EDGAR: In a jury case involving factual insufficiency, greater weight, yes, sir.

JUSTICE MCCLOUD: All right.

MR. SOULES: Okay. Those in favor of the proposed change to 52(d), first is there further discussion?

PROFESSOR DORSANEO: We already have some language under the letter (d) in Rule 52. I don't know whether this is meant to be added to that or whether it's meant to be (e). What it says now is a necessity for motion for new trial, the subheading is Necessity for Motion for New Trial in Civil Cases. And then it says a

point in a motion for new trial is a prerequisite to appellate complaint in those instances provided in Paragraph B of Rule 324 of the Texas Rules of Civil Procedure. All of this could be rolled together in there, but I'm basically taking it as a cross reference ought to be adequate as it is stated now, but I would never be opposed to clarification.

PROFESSOR EDGAR: I agree with you that -- I don't have a problem with this personally, Bill, but there are some courts that are troubled by it, and they're taking the position that by failing to include a factual sufficieny point in a motion for new trial waives an appellate complaint because of the mandate of 52(a) in spite of 52(d).

PROFESSOR DORSANEO: What I would recommend, Hadley, think about this: Changing the current 52(d) by deleting the words "necessity for" such that the subheading of 52(d) is simply Motion for new Trial in Civil Cases, and I'm not even wedded to that at all, having it say what it says now, and then "a party desiring to complain on appeal in a non-jury case," which is further

amplification of what it says by indirection now.

PROFESSOR EDGAR: I have no problem with that.

JUSTICE MCCLOUD: Let me ask this question: I remember this to be -- under 324, a motion for new trial required, and I know this has been written on, it seems to me like -- it seems like I might have written an opinion on it on the Supreme Court. I can't remember. But it says, "A complaint of factual insufficiency the evidence to support a jury finding."

MR. MCMAINS: That's right.

JUSTICE MCCLOUD: If you don't have a jury case, if you're in a non-jury case, then this 324 obviously says you have to find a motion for new trial if you want to complain about factual insufficiency in a jury finding or if you want to complain against the greater weight of the evidence in a jury finding. I believe that --

PROFESSOR EDGAR: The problem is Appellate Rule 52(a), if you'll

look at Appellate Rule 52(a), it basically says that you can't complain on appeal of anything that you haven't caused to file judgment attention in the court below. Well, if you're going to complain of factual insufficiency in a bench trial --

JUSTICE MCCLOUD: 324 doesn't require it.

PROFESSOR DORSANEO: 52(a) might.

PROFESSOR EDGAR: 52(a) there are courts that say that that does require you to complain by motion for new trial. That's what we're trying to clear up.

JUSTICE MCCLOUD: Okay.

PROFESSOR DORSANEO: I think you did write the opinion, Howell vs. Coca-Cola Bottling.

JUSTICE MCCLOUD: It seems real familiar to me.

MR. SOULES: This gets the job done. Are we ready to vote on this? How many are in favor of the proposed change to --

PROFESSOR EDGAR: Bill

made some suggestion, didn't he, that we tie in the first sentence of what is now 52(d) with my recommendation? Didn't he suggest that we tie those in in some way?

MR. SOULES: Yes. But the Chair has not gotten the message in words yet, and I'm trying to get it to a vote.

PROFESSOR EDGAR: I move the recommendation on page 221.

MR. SOULES: Can we do that as a second sentence rather than another paragraph?

PROFESSOR EDGAR: That's the way I had suggested it.

MR. SOULES: The motion is that we amend Rule 52(d) by adding another sentence at the end, the text of which is found on page 221 of the written agenda. Those in favor say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? That's unanimously recommended. Okay. That takes care of that report. I think maybe we'll divert from the TRAP rules for a moment, if we can. Let's see.

Let's go ahead and take TRAP Rule 90, which is publication rule. It says automatically when the Supreme Court grants a writ, the Court Appeals shall cause an opinion to be published, page 224.

MR. MCMAINS: We already discussed this the last time, and it is already recommended.

MR. SOULES: Okay.

MR. MCMAINS: In one respect the question is whether or not the Supreme Court is willing to pass on the issue of publication.

MR. SOULES: That's right. This says that they --

MR. MCMAINS: Or whether or not it's going to be automatic.

MR. SOULES: This rule is that it be automatic.

MR. MCMAINS: This proposed rule or suggestion is that it be automatically done.

MR. SOULES: Those in favor say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed?

JUSTICE MCCLOUD: Wait a minute. I have got to ask a question. I'm looking down here at (h). That's what we're talking about on the existing rule?

MR. SOULES: Yes, sir.

JUSTICE MCCLOUD: If I'm reading that, and apparently I'm not reading it right, it says "order the Supreme Court upon the grant or refusal of an application for writ of error," either grant or refusal, outright refusal or just by --

MR. MCMAINS: It's on page 104. Page 104 is what we have passed, and actually what is reproduced, re-put in here, they didn't make the change we made earlier in the rule.

JUSTICE MCCLOUD: The way that reads, you know, you can have the NRE case and it's just published.

MR. MCMAINS: That's right.

JUSTICE MCCLOUD: And God knows if that's got to have all of those issues.

MR. MCMAINS: That's exactly what the issue is. That's what we passed on last time.

JUSTICE MCCLOUD: You want all that junk published? I'd like to have a minute or two. A lot of stuff out there. There are 7,000 opinions or 7,000 cases a year disposed of by the Courts of Appeals in Texas. And if they're all published, there's not enough people in this -- you couldn't get enough law book space.

MR. SOULES: This is only if an application for writ of error is acted on by the Supreme Court.

JUSTICE MCCLOUD: Is granted?

MR. SOULES: Acted on.

PROFESSOR EDGAR: I thought our concern was that if it was granted. That's what we wanted to accomplish.

JUSTICE MCCLOUD: What I'm reading says whether it's granted or whether it's refused.

MR. SOULES: Hold on just

a minute. Let me get the Committee to order. What is on 224 has been erroneously reproduced in my office, and I apologize. What we should be looking at is page 104. And does that on page 104 correctly state the vote of the Committee last time?

MR. MCMAINS: It was the last phrase. That's what we don't know. What I think there's a dispute over is whether the last phrase was in there.

MR. SOULES: Whether it would be automatic?

MR. MCMAINS: Apply for it or whether or not it happens automatically, and that's the issue. And I don't recollect what the vote was.

MR. SOULES: We voted after you left.

MR. BECK: Let me understand. Are you proposing that we drop the last phrase, quote, "if the Supreme Court so order," and make it mandatory?

MR. MCMAINS: Yes. I mean, that I think is what I thought that we had actually decided on.

MR. SOULES: That's right.

MR. BECK: That's the issue.

MR. MCMAINS: The issue is whether or not that is in fact what we decided on.

JUSTICE MCCLOUD: The issue is if it's granted, if application for writ is granted or if application is refused or --

MR. MCMAINS: Or denied.

JUSTICE MCCLOUD: Denied?

MR. MCMAINS: Yes.

JUSTICE MCCLOUD: Not denied.

MR. MCMAINS: Yes. Denied.

MR. SOULES: We voted on that, and we carried it the last meeting. The issue to be carried over was --

MR. MCMAINS: The last --

MR. SOULES: -- "an opinion previously unpublished shall forthwith be released by the clerk for publication,"

which would be automatic or if we left "by the clerk of the Court of Appeals," and delete -- whether we would delete "if the Supreme Court so orders." Is the vote of the Committee that -- just take a vote.

MR. TINDALL: Can we discuss it?

MR. SOULES: Shall the publication be automatic or only if the Supreme Court so orders? How many vote that it should be automatic?

PROFESSOR EDGAR: There's bound to be a middle ground here we can discuss, Luke. For example, it seems to me that if the Supreme Court wants to order anything published, it ought to be able to do so regardless of the action, grant, denial or refusal.

MR. SOULES: Right.

PROFESSOR EDGAR: But it seems to me that if the court grants an application, then it ought to be published, because then the reader will have something to fall back on by a published opinion of the Court of Appeals.

MR. SOULES: The Chair is going to call the Committee to order. The grant or refusal of an application, I believe the Committee has voted to cause that to automatically be published if the Supreme Court so orders.

I'm going to take this a piece at a time. If there's an outright refusal, then that opinion is like the opinion of the Supreme Court of Texas, or if there is a grant, is it the vote of this Committee that under those circumstances the opinion is to be automatically delivered for publication by the clerk of the Court of Appeals? Those in favor show by hands. Okay. That's unanimous.

Now, is there someone who voted at the last meeting to include denial in this text who would like to move for reconsideration of that. There being no motion, then --

PROFESSOR DORSANEO: I don't remember, but I'll move for reconsideration.

JUSTICE MCCLOUD: I'd like to be heard on that as a representative of the

Court of Appeals. If I understand what you're saying is that every opinion that is written in this state by the 14 Courts of Appeals any time they're appealed, and hundreds of thousands are, that even if it's what we call an NRE, they're either going to be granted, they're going to be refused, or they're going to be refused NRE. And what you're telling me is every opinion is going to be published. It's either going to be granted published, it's going to be refused published, or it's going to be denied published. So just take all that junk out and say every case is going to be published.

MR. SOULES: No, judge. Only a small percentage of the cases decided in the courts of appeals go to the Supreme Court on appeal. This is only in the case --

MR. TINDALL: That wasn't the vote in May, was it?

MR. SOULES: Yes.

MR. TINDALL: That's not what the minutes reflect.

JUSTICE MCCLOUD: Are you talking about an application being filed or --

MR. TINDALL: Page 104 --

MR. SOULES: Hold everything.

(At this time the Committee was cautioned to speak one at a time by the court reporter.)

MR. TINDALL: 104 just talks like it was purely -- the comments was a textural corrective change only, which obviously meant you put "denial" in place of "NRE," and that would make it at the option of the court.

JUSTICE MCCLOUD: Yes.

MR. TINDALL: Now to say that you're going to mandate the publication of every Court of Appeals opinion when they deny a writ is unheard of.

JUSTICE CLINTON: Let's all go buy some stock in a publishing company.

PROFESSOR DORSANEO: I don't think we ever voted on this --

MR. BECK: The only issue remaining as I understand it is whether or not the Supreme Court is going to -- must publish

the order, publish the opinions when there's been a denial.

MR. SOULES: Yes.

MR. BECK: Or whether or not they have discretion to so order. That to me is the only remaining issue.

MR. SOULES: How many feel that if the writ is denied, that when a writ is denied the Court of Appeals opinion should be automatically published? Show by hands. None.

MR. MCMAINS: When the application is acted on on merit.

MR. SOULES: Yes. None. No one feels that way. So we'll take out denial.

JUSTICE MCCLOUD: Thank you.

PROFESSOR EDGAR: Look, Luke, here is what we've done. At our meeting at page 104 we voted in May to make the change that appears here under subdivision (h).

MR. SOULES: Yes.

PROFESSOR EDGAR: Which if the Supreme Court so orders it, it can order

any of these Courts of Appeals opinions to be published. That's what this says.

MR. SOULES: Okay.

PROFESSOR EDGAR: And I think that's what we want to do. We haven't voted to change that. If the Supreme Court wants them published, then the Supreme Court can do so. However, we have just voted earlier that we are recommending to the court that if the Court grants or refuses an application, then it be mandatorily published. Now, that's what I thought we were doing.

JUSTICE MCCLOUD: That's all right.

MR. BECK: That's what we agreed on.

PROFESSOR EDGAR: That's it.

MR. SOULES: How do we fix the text here? Do I take out "denial"?

PROFESSOR EDGAR: You have to have two sentences.

MR. BECK: Two sentences.

PROFESSOR EDGAR: You're

going to have first "Upon the grant or refusal of an application for writ of error an opinion previously unpublished shall forthwith be released for publication," period. Then you'll have another sentence reading just as it reads here on page 104.

JUSTICE MCCLOUD: "Upon denial the opinion previously unpublished" --

MR. TINDALL: -- "may be released for the publication."

MR. SOULES: Let me put it in the record here so that Holly can get it. She'll be having to get this out pretty quick. (h) then will say, "Order of the Supreme Court. Upon the grant or refusal of an application for writ of error an opinion previously unpublished shall forthwith be released by the clerk of the court of appeals for publication," period. The second sentence, "Upon the denial of an application for writ of error an opinion previously unpublished shall forthwith be released for publication if the Supreme Court so orders."

MR. BEARD: Luke, let me suggest upon the denial or dismissal, WLJ in

there that might need to be published, denial or dismissal.

MR. SOULES: Or dismissal.

MR. BEARD: And the petition might dismiss one if the court decides.

MR. SOULES: Be released.

JUSTICE MCCLOUD: Dismissal that they want it published.

MR. SOULES: Those in favor say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? Okay. That carries unanimously. That changes TRAP 90, what will be two sentences under (h).

Okay. David, we need to get to your report. Why don't we go ahead and get to the items that you are here to report on.

MR. BECK: Let me start first on the suggestion by Justice Hecht with respect to Rules 99 through 107. I don't know where they are in the notebook, Holly. Do you

know, the proposal that he made on May 25th, 1989?

PROFESSOR CARLSON: It's on the last page.

MR. BECK: Basically what Justice Hecht points out is a local Justice of the Peace complained that there are inconsistencies in the requirements for service of citations understand Rules 99 through 107 and Rule 533 through 536 through the Texas Rules of Civil Procedure. We had recently rewritten and amended rules 99 through 107. So the recommendation of our committee is that the subcommittee of the Supreme Court Advisory Committee that deals with Rule 533 through 536 look at those rules, because they haven't been amended in 40 years, to try to bring them in line with the amendments we made with the service rules in Rules 99 through 107. So they really need to look at the Justice of the Peace rules. We don't need to look at Rules 99 through 107, because we just did that last year. That is our recommendation.

MR. SOULES: We need to

assign to the proper standing subcommittee Rule 533 through 536 to be conformed to the changes made to Rule 99 and 107; is that right?

MR. BECK: Yes.

MR. SOULES: They are so assigned.

MR. BECK: The next proposal is item agenda Item Number 10, and this was a special subcommittee point with respect to Rules 38(c) and 51(b). I want to make clear that I have not conferred at length with Broadus Spivey, so I'm just going to say I'm talking for myself.

PROFESSOR EDGAR: What page?

MR. BECK: It's a carry-over from our last meeting.

MS. HALFACRE: It starts at 243.

MR. SOULES: Page 243. It starts "Direct Actions."

MR. BECK: Basically what this proposal does is allow for the filing of direct actions against either of the insurance

companies. Rule 38(c) contains the prohibition against that, the joiner insurance company tort action. Rule 51(b) contains an identical sentence which also contains the same prohibition. It's my understanding the Administration of Justice Committee had a similar proposal before it. In the past year a subcommittee was appointed to consider the proposal, and no recommendation was ever forthcoming.

I personally am unaware of what the empetus is for this proposed rule change, so I really don't have any recommendation. I guess what I need is a reading from this committee as to what they feel about the concept before we start trying to amend our rules.

MR. SOULES: Broadus Spivey in the 1987 session of this committee moved that a special committee be appointed to study whether to change these rules to permit direct actions. And that's when I made the assignment. It was his.

MR. MCMAINS: Actually you were asked to do it, I think, by Justice

Kilgarlin.

MR. SOULES: I don't remember it that way. But that doesn't mean that's not the way it came up. I thought Broadus raised it. But anyway, because Broadus spoke about it he was one of the chairs of the committee appointed, and I felt that David would be helpful also. I don't think there's been any real study done since the suggestion was made, but I would like to get it -- I would like to deal with it as an agenda item. It's been here for two years, and it hasn't caught enough interest to move. That really originated here. I'd like for someone to suggest how we deal with it as an agenda item.

PROFESSOR DORSANEO: I spoke with Doak earlier. Apparently the amendment, it just died a natural death in the Administration of Justice Committee, and there apparently is not a real ground swelling enthusiasm there either.

MR. BISHOP: It originated in this committee, and we were asked to take a look at it, and there were no reports made on

it.

MR. SOULES: Does anyone have a recommendation on whether to amend these rules to permit direct actions in Texas?

MR. TINDALL: I move we table it.

MR. SOULES: I don't want to table. I want to act on it.

MR. MCMAINS: Motion to reject.

JUSTICE MCCLOUD: Seconded.

MR. SOULES: The motion is made to reject the change to permit direct actions. Those in favor of rejecting say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed?

MR. MORRIS: No.

MR. SOULES: One no. The ayes have it.

MR. BECK: The next rule is Rule 57 on page 316 of the notebook; and basically what this proposal does is require

attorneys to list their telecopier numbers whenever they file a pleading in the lawsuit, because we're now required to list our phone numbers and addresses and so on. You'll also recall the last meeting we agreed to amend Rule 21(a) to allow for the giving of notice by the telecopier, so it seems logical that if we're going to permit that we ought to at least make it easier mechanically for parties to learn what the telecopier numbers are of opposing counsel. So our subcommittee recommends this rule be changed and be adopted.

MR. SOULES: Let's see. The text appears where?

MR. TINDALL: Page 318.

MR. SOULES: 318.

MR. SOULES: Any discussion?

PROFESSOR DORSANEO: I'm against that.

MR. SOULES: Any discussion? Those in favor say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed. The

ayes have it.

MR. BECK: The next proposal is the special appearance rule, Rule 120(a), which I believe is on page 319. At our last meeting I was asked to try to put into writing the substance of a lot of the conversation we had; and just so you'll know what I have done, I went back and looked at the venue rules in an effort to see what was permitted under Rule 87. And I tried to make it as consistent with that rule as possible so we didn't have one set of proceedings for venue and another set of proceedings for jurisdictional hearings.

Basically what this change does, it allows the use of affidavits in hearings on special appearances. It does not in any way and is not intended to alter in any way the burden of proof in a special appearance proceeding. And the reason for this general interest in the proposal is really to try to cut down on litigation expenses. And so again, there's no subcommittee that analyzed this. I was just asked to put this in writing.

So my view would be that we adopt the change of this type for Rule 120(a) and we allow the use of affidavits in venue proceedings, we allow the use of affidavits in summary judgment proceedings, and it seems to me logical to allow use of affidavits in jurisdictional hearings.

JUDGE CASSEB: You're just adding the paragraph then?

MR. BECK: Yes, sir.

PROFESSOR EDGAR: I notice you're also still permitting oral testimony.

MR. BECK: That's right.

PROFESSOR EDGAR: So it does differ from the venue.

MR. BECK: That's right. In a jurisdictional hearing where a defendant is coming in saying that you have no jurisdiction, independent jurisdiction over me, your witnesses are probably going to be out of state or out of the country.

(At this time there was a brief discussion off the record, after which time the deposition continued as follows:)

MR. SOULES: Bill, your

concern is that, of course, you can't cross examine an affidavit, and if affidavits are used in a 128 special appearance hearing, then you have some concern about that. What is your concern?

PROFESSOR DORSANEO: My concern is that somebody will bring an affidavit instead of somebody to be cross examined to the hearing, and that will either cause delay or --

MR. BISHOP: The real concern was timing.

PROFESSOR DORSANEO: It's a timing concern.

MR. BECK: If you file your affidavit a couple of days ahead so that if somebody wants to take discovery of that person, they can. This doesn't prohibit discovery, so that's --

PROFESSOR DORSANEO: I like the idea of doing this by affidavits if feasible to do it, but I don't want that to control normal concerns for testing statements made under oath.

MR. BEARD: Or the Federal

court disposes of it all the time.

MR. HERRING: Last time under Rule 166(b) we adopted the seven-day requirement for affidavits that were going to be prepared on discovery, which I think is on page 43.

MR. SOULES: Let's look at that, Charlie. Let's look at that together here. Turn back to the materials on page 43.

MR. BEARD: This will bring this in line with the Federal court practice.

MR. SOULES: I think there are maybe two things that can be said. You know, we have got a provision in the summary judgment rule that gives, cuts a party some slack to do discovery. We have to look at the test. But the time requirement for affidavits and discovery hearings -- here it is. It's on page 43.

MR. HERRING: Down in the middle where it says, "shall be served at least seven days before the hearing," add that in on affidavits.

MR. SOULES: "The

affidavits if any shall be," and just use this word, "shall be served at least seven days before the hearing."

MR. BECK: I think that's reasonable.

MR. HERRING: Gives you a little protection.

MR. BECK: Good suggestion.

MR. SOULES: "Shall be made on personal knowledge, shall set forth" and so forth. And then let me look just a moment at Rule 166(a) for that language, just run it by and see if it's got any merit to think about putting this in there too.

JUDGE PEEPLES: How much notice will both sides have on a 128?

MR. SOULES: Seven days. There's not any notice time, is there? The affidavits are going to be sevens day before the hearing.

JUDGE PEEPLES: Is it possible the hearing can get scheduled too quickly to get affidavits?

PROFESSOR EDGAR: Luke,

I've got a problem with the seven-day time fuse on this.

MR. SOULES: What is that, Hadley?

PROFESSOR EDGAR: It seems to me that a party who is going to have -- that knows that there is going to be -- to have to contest an affidavit ought to have more than seven days in advance to utilize any discovery process that he might want. It seems to me that the 30-day provision in motions to transfer venue would probably be more of an adequate time provision than seven days, because the seven-day provision that you're talking about in Rule 166 is when you've already been involved in the discovery process, but here you don't really know that you're going to have a -- you're going to have to fight an affidavit until seven days before the hearing as is now promulgated. And if you have witnesses who are outside the state or outside the country as many of them might be, it just seems you need more time.

MR. SOULES: That may be, and I think maybe that's one of Judge Peeple's

concerns. 166(a)(f) is the safety valve in summary judgment proceedings. "Should it appear from the affidavits of a party opposing the motion that he cannot for reason" -- this will fit summary judgment language, but the concept is here -- "that he cannot for reasons stated present by affidavits facts essential to justify his opposition, the Court may refuse the application or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as may be just."

The only reason that, and I'm not -- I think that language could be used or modified, but if we put in here this special appearance rule an expression that a party is to be given time to do discovery or obtain affidavits, then we're putting right there in that same rule information to the judge that he's supposed to assist in causing the hearing to be a hearing, that after full development of the facts pertaining to it, and that might be a good idea or it might not. Just raised.

MR. BECK: I agree with that. I think that's fair. The question is whether you just -- you want to be very specific or whether you want to put some type of a bottom time period on it that you've got to file your affidavits or you're going to leave them to the discretion of the Court, at least some type of a safety valve. 30 days would certainly be.

MR. BISHOP: I don't think there would be any problem including the same thing you have in Rule 87, give 45 days notice, hearing 30 days, file affidavits 30 days in advance, although keep in mind that the Court is required to hear the Rule 128 motion in advance of other motions. That's in the rules, so that would be the only possible concern. It could be a problem if you've got a temporary injunction hearing which is on a short fuse and you start putting these kinds of things in there. It could be a problem. But absent that, it's not going to be a problem in most cases.

MR. SOULES: The concern I have about lenthening this out, and maybe it's

not very well thought through, but usually these jurisdiction special appearance things, I like to get them heard as soon as possible regardless of which side I'm on, because if you don't have jurisdiction, there's no sense doing a bunch of work and discovery. And if you're not under the jurisdiction of the court, you sure don't want to have to pay to attend a bunch of jurisdiction and discovery.

So to me to compress the period down and to build in some kind of safety valve is one approach that one might take to get these things disposed of expeditiously. Venue, of course, is all together different. You can do discovery in a case no matter where it's going to be tried. It may get moved from San Antonio to Houston, but the discovery is still good, so it's not a matter of all of a sudden the slate is wiped out.

I don't know. To me to leave seven days on the affidavits is to put something in here about if people can't get ready in time to do discovery and get the other affidavits more fits the special

appearance concept, but that may not be what you-all think. It's just what I think.

(At this time there was a brief recess, after which time the deposition continued as follows:)

MR. SOULES: Okay. We're back on the record. Elaine Carlson.

PROFESSOR CARLSON: Something you just said, you know, it seems to me that this may result -- in trying to appease all of the concerns may result in a more expensive process, because if you have your submissions by affidavits, it seems they'd turn around in all likelihood and take the deposition of the defendant who is a party and be required to give his testimony.

It seems by providing for the affidavit and then the discovery and then the subsequent potential oral testimony that by giving the best of all worlds we're really increasing the cost of potential litigation jurisdictionally.

MR. BECK: It depends what you put in the affidavit. Sometimes you can only get testimony very precise from one

witness that lives in Buffalo, New York, but it's not the type of fact that people are going to contest very much. If you have somebody -- you're going to try to lay out every conceivable argument in favor of non-jurisdiction, that person is going to be deposed. I think it really depends upon what you're trying to prove by your affidavit.

PROFESSOR DORSANEO: Well, I think that we're going to get back to the problem of who has what burden ultimately, because that is what protracts, is what's going to protract the affidavit: "I don't do this; I don't that; I don't do that."

MR. BECK: Under current law the defendant has the burden.

PROFESSOR DORSANEO: It's going to be a long affidavit. If you're prudent I would suspect that most people would not simply say, "I don't live in Texas; I'm domiciled in Arizona."

MR. BECK: But see, you may need to meet your burden with five or six different witnesses, and you only want to call one or two live, and the other four you just

want to use affidavits because the substance of their testimony is really not very controversial, but you have to have that to meet your burden.

MR. SOULES: Okay. Well, let's take this one at a time, I guess, then. If we put in the language that affidavits have to be served seven days before a hearing, how many are in favor of permitting proof by affidavits in 128 hearings along the line of this proposed change on 319? Show by hands, please. Those opposed? That's unanimous. I recommend this language to be adopted by the Supreme Court, but with a seven-day notice provision on the affidavits. Does anyone have any desire --

PROFESSOR EDGAR: I thought you were also going to include in that as you stated earlier perhaps some language about delaying the hearing for purposes of discovery. Is that to be included in this?

MR. SOULES: Let's just take a vote on that. How many feel that language conforming as much as possible to that in 166(a)(f) should be tailored for

120(a) and be included as well to permit -- indicate to the trial judge that a party having problems where responses be given some time to get responsive evidence together and if necessary to take discovery? How many agree with that? Show by hands? Opposed? That's also unanimous.

I'm going to give you some language now for that, but when I write it it may be slightly different in text. "Should it appear that a party opposing an affidavit cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just." Is that generally acceptable?

HONORABLE RIVERA: Luke, is that what the rulebook says? It's in the new proposed rule that we just passed last month, "The Court may permit affidavits to be supplemented or opposed by depositions or by further affidavits." That's the language we approved last month.

MR. SOULES: Where is that now?

HONORABLE RIVERA: On page 38 of the agenda.

MR. SOULES: That would also then need to be --

JUSTICE RIVERA: Page 38 it's the new (f) at the middle of the paragraph, "the Court may permit."

MR. SOULES: Where is it, judge? I'm sorry.

HONORABLE RIVERA: On page 38.

MR. SOULES: Page 38.

HONORABLE RIVERA: It's a new (f). It was an (e) and been stricken off. It's a new (f) in the middle of the paragraph five or six lines from the bottom, "The Court may permit affidavit to be supplemented or opposed by deposition or by further affidavit."

MR. SOULES: Okay. We'll put that in there too. Okay. So we would take that language from what was formerly (e) and (f) of 166(a) that I gave and that that

Judge Rivera gave and add in here as a safety valve. Is that the consensus of the committee? Those in favor say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? That's also unanimous.

PROFESSOR EDGAR: Luke, in 128 paragraph one, David, you say here "in the use of discovery," and you're adding "and related processes." What -- that kind of bothers me a little.

MR. BECK: Yeah. And I'm trying to remember why I put that in there. Somebody at the last meeting requested that phrase in there, and I don't know whether it was because it contemplated suppoenaing documents or subpoenaing witnesses.

HONORABLE RIVERA: "Production of documents, interrogatories and telephone depositions."

MR. BECK: Maybe that's what it was.

PROFESSOR EDGAR: Is that your suggestion?

HONORABLE RIVERA:

Somebody else said.

PROFESSOR EDGAR: Wouldn't that be discovery? The think I'm concerned with --

MR. BECK: The custodian of records for a trial appearing, is that discovery or what?

PROFESSOR EDGAR: I'm just concerned about the use of "things related," because then you get into when do you invoke the affirmative jurisdiction of waiver of special appearance?

MR. BECK: Who ever suggested that request, would they step forward and defend?

MR. SOULES: That is --

PROFESSOR EDGAR: I think that is a cause for concern. I'm just concerned about it unless we know what we're talking about.

MR. SOULES: That's a change from the overall charge to the Committee. The charge to the Committee was to examine the burden of proof and to examine the type of proof that could be used, and this is

an item that deals with when the special appearance has been waived, and that's completely different than what I've even --

MR. MCMAINS: Process of witness is right there in the rule already first thing. I don't know what "related process" means.

MR. SOULES: How many feel like these words "and related" should not be in the change suggested to the Supreme Court? Show by hands? And those who feel these words "and related" should be included? Show by hands. Okay. It's unanimously voted where it's not to be recommened in number one.

Now as it's constituted those in favor of recommending Rule 120(a) amendments say aye, please.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? It will be recommended.

What's the next item, David?

MR. BECK: Well, the last item on my agenda really is something that Frank Branson worked on. I don't know.

Frank's report, wait for him to give the report.

MR. SOULES: Let's see what that was.

MR. BECK: It's Rule 13.

MR. SOULES: What page is it on? Page 238. Frank is suggesting that the 90-day fuse for the 90-day safe harbor from sanctions for frivolous pleadings be deleted from our rule. I kind of like it. I like the rule with a 90-day safe harbor.

How many feel that the 90-day safe harbor should be retained, show by hands? Those that feel it should be deleted show by hands? The majority vote the Committee recommends the Supreme Court reject change, the proposed changes to Rule 13.

(At this time there was a brief discussion off the record, after which time the deposition continued as follows:)

MR. SOULES: All right. Does that take care of your reports, David?

MR. BECK: Yes, it does.

MR. SOULES: Let's go back and finish the appellate procedure agenda,

which I guess is 82 on 223.

MR. MCMAINS: I thought we voted this down, but apparently not. It has surfaced again. That probably gives you a clue of where I stand on the proposal. Hatchell is of the same view.

This is question, and we had some fairly protracted discussion last time about an intermediate decision of the appellate court somehow becoming an enforceable judgement to the trial court for enforcement purposes.

MR. SOULES: This is the (Boscamp) situation.

MR. MCMAINS: This is the proposed rule basically that --

MR. SOULES: This is page 223. Excuse me. Go ahead.

MR. MCMAINS: That somehow that ought to be become enforceable. It ignores frankly the historical station we've always had in terms of what the mandate actually is in the appellate process, which the mandate which is the last act accomplished to terminate the appeal is then the judgment

that the trial court enforces. If it's different, then it replaces it. Up 'til that time the trial court judgment is the judgment and stays the judgment.

This change as proposed here basically says whenever the court renders an opinion changing that judgment, then all of a sudden they notify the trial court and the judgment becomes the Court of Appeal's Judgment. And as far as this actual rule is written that even includes even though a motion for rehearing may be pending. I mean, this is just immediately.

And I understand the concern of, "Well, you've got somebody up here that says that you are entitled to" -- for instance, if you didn't get any money below. You all of a sudden got entitled to some money, and you want to keep it from wasting assets or something, and you can't do that with any of our practices, because you don't have a judgment to do it with.

But I still feel -- I am very troubled about a notion of treating interlocutory, in essence non-final decisions

of the appellate court as being the final decision when even that court can change its mind. If you're having different things filed and executed on, I don't see that.

PROFESSOR EDGAR: Who was the author of this?

MR. SOULES: I did. It was me.

PROFESSOR EDGAR: All right. Luke, as you envisioned it, how can the Court of Appeals direct the sheriff to go out and levy execution?

MR. BEARD: File a new supersedious bond down there, go through all that.

PROFESSOR EDGAR: It seems to me like you're asking the appellate court to undertake a lot of direct supervision that's been traditionally handled by the trial courts with some degree of success.

MR. SOULES: Well, it doesn't tell the sheriff to do anything. It directs the clerk to permit an abstract to be filed which creates a lien on the assets that I now have a judgment on and for the clerk to

enforce the judgment, which means for the clerk to issue writs of execution, writs of garnishment, whatever writs or process I want issued by the clerk in enforcement of the judgment. That's all. It's just a notification to the clerk to permit the judgment of the Court of Appeals reversed and rendered and now I've got a -- I have got a six million dollar verdict from the jury. The trial judge NOVs. The Court of Appeals reverses the NOV and renders judgment in my favor on a jury verdict. I now have a judgment for six million dollars. I want that judgment secured just like I could have had it secured if the trial judge had not erroneously NOVed my judgment, my verdict.

So I want the defendant against whom I originally got a verdict and against whom I now have a judgment out of the Court of Appeals to have to either supersede that judgment or I want to be permitted to at least abstract that so that I can put liens on the property of the judgment debtor, and I would like also to have execution and other writs of enforcement so that I can start

collecting on this judgment that I was entitled to but denied in the trial court. That's the purpose of this.

HONORABLE RIVERA: Don't you need a judgment to order this execution?

MR. SOULES: No. You don't need that. It's automatically a right to a judgment holder.

JUSTICE MCCLOUD: Well, normally that's done later by mandate.

MR. SOULES: It is done later. This is to move in point of time to the moment where the Court of Appeals says I am entitled to my judgment on a verdict my right to have my judgment secure, not wait until it goes all the way through re-hearing, petition for writ of error, up to the Supreme Court, and so forth, and waiting on that mandate to come back, which can be months or years later during which period of time the assets have all left town.

JUSTICE MCCLOUD: Like if it's an affirmance, this has to do with reversal. You know, 82 has to do with affirmance. You still follow the same mandate

procedures under that, don't you? It seems to me --

MR. SOULES: Well, on affirmance if I had gotten my judgment in the trial court --

JUSTICE MCCLOUD: Well, if there's another side to the lawsuit.

MR. SOULES: I would have been marching in the mean time or had a supersedious. This just gives me the same options after the Court of Appeals rules my way that I would have had if the trial court ruled my way.

MR. MCMAINS: I think they're not the same option. This is an extremely accelerated procedure in comparison to what you have to work with in trial court. If you get a judgment in the trial court, you've got a long period of time before you can enforce it. Granted, you can file the lien. That's it. You can't do anything to enforce the judgment. You can't go out and execute while a motion for a new trial is pending, et cetera.

MR. SOULES: But you can

garnish.

MR. MCMAINS: This rule authorizes that you do immediately while there's a motion for re-hearing pending. The court may change its mind. It may change its opinion and does it again. Execute the issues on what? On the other judgment?

Now, what happens in the interim with that? Where do you go for that relief when you have to go back to the trial court? All the Rule 47 rules and all of the supersedious rules are geared to determinations as we already made today to the trial court level. And we are talking about all of a sudden you have to go back to the trial court with regard to all the issues, which didn't have it before, but now they've got to do it immediately, because your title executes immediately in spite of the fact that they've got 15 days to file a motion for re-hearing.

MR. SOULES: That's right.

MR. MCMAINS: And I find that to be absurdly complicated.

MR. SOULES: It's pretty simple.

MR. MCMAINS: Terribly inconsistent. It is not simple. It is dumn.

MR. SOULES: Well, it may be in your view. I think it's smart.

MR. MCMAINS: Every rule that we have with regards to the way the court operates by mandate.

MR. SOULES: Okay. John O'Quinn, you have the floor.

MR. O'QUINN: It's been my experience about when Russell is wrong he starts using insulting language.

MR. SOULES: Did you have anything else to say about that, John?

PROFESSOR EDGAR: Then in that event the Defendant then would immediately have an opportunity to attempt to supersede the judgment.

MR. SOULES: That's right.

MR. O'QUINN: The problem is that if the trial court judgment is strong enough or important enough to require

supersedious to protect the right of the plaintiff, why should not a Court of Appeals judgment be so particularly based on a jury verdict? And I really think there may be -- some fine tuning may be needed with the procedure we have here. I think there needs to be some remedy for the Plaintiff who was wrongfully denied a jury verdict because of an NOV when the Court of Appeals agrees with the plan.

JUSTICE MCCLOUD: My questions wasn't talking in terms of NOV. There are all kinds of cases that are reversed that have nothing to do with NOVs. This is just kind of an open deal. Any time if you reverse one, well, you just enter this order and tell the clerk of your court to get down there and abstract that thing and enforce the judgment.

MR. SOULES: As in other cases. In other words, if not superseding.

MR. BEARD: Well, let's suppose the court reverses it's judgment in your favor. Does that destroy the supersedious bond at that time?

MR. SOULES: There is no supersedious bond.

MR. BEARD: You've got a judgment. The Court takes it away from you. You have a supersedious. Now, we drag down the supersedious and run off with the money at that point and then get it back at the Supreme Court. So it just wiped it out.

JUSTICE MCCLOUD: It cuts two or three different ways. I sure would think that's got some things in it that don't look too good to me. I mean, we've been handling it through mandates all of these years, and the only situation that really comes to your mind probably is that NOV situation or just any reversal.

MR. SOULES: Where the plaintiff is denied a judgment in the trial court and a Court of Appeal reverses that and renders judgment, money judgment for the plaintiff, in any circumstance where that happens the purpose of this rule is to get enforcement of that judgment from the Court of Civil Appeals promptly or supersedious so that that judgment is now protected just as it

would have been if the trial judge had entered the proper judgment to start with.

MR. TINDALL: Why not have it the other way, though --

MR. BEARD: That first supersedious if it --

MR. SOULES: I don't have any problem with.

MR. TINDALL: Releasing the supersedious if they get a reversal?

MR. SOULES: I don't have any problem with that. At that point I think the judgment has been withdrawn. It has been reversed, and why should a company continue to have millions of dollars of assets tied up when the judgment of the trial court has been found to be erroneous and has been reversed.

MR. MCCLOUD: That's been reversed by an inferior intermediate appellate court.

MR. O'QUINN: Inferior. Less inferior than the trial court.

MR. SOULES: There's a case where a party went into bankruptcy and the Court of Appeals reversed the judgment of

the trial court andd there still couldn't be any relief granted so these people could come out of bankruptcy, and there wasn't even -- at that point there wasn't a judgment against them. But they were still harbored in bankruptcy court because they couldn't supersede a judgment that had been found to be erroneous. So I don't have any problem with that side of it happening as well.

I think there are -- one of the big injustices in the appellate process is that you can't get relief pending appeal to get out to either to get a judgment superseded or executed on coming out of the Court of Appeals or to get out of the problem the trial court erroneously put you into. And to me at any point where a party is positioned as they would have been properly positioned if the trial court had properly ruled, they ought to have the same rights that they would have had if the trial court ahd properly acted. And if three judges on the Court of Appeals or two, maybe one dissent, decide the trial judge was wrong, to me that's a more current decision.

And that's what the

purpose of this is. I'm not trying to sell it. I think it's the right thing, but when it's understood and voted on we'll put it to the committee. Judge McCLoud.

MR. MCCLOUD: Well, it may be the right thing. I hadn't thought it out as far as that is concerned. The thing that would concern me is just the mechanics of it, in that it's sort of abrupt. Let's suppose it occurs and it says you go back to the district clerk and he's to abstract and enforce the judgment of the Court of Appeals as in other cases. What do you envision happening at that time? Would he go over here to Rule 47, or what would he do?

MR. SOULES: What would happen if --

MR. MCCLOUD: That's what I'm interested in.

MR. SOULES: Okay. Here is what would happen. Just like you can order a district clerk to get a transcript on file with your court, you have certain authority over a district clerk.

MR. MCCLOUD: That's

true.

MR. SOULES: The Court of Appeals has authority over the district clerks in the State of Texas to some extent.

JUSTICE MCCLOUD: Transcripts.

MR. SOULES: Transcripts. All right. The Supreme Court says you've got authority. If they adopt this rule they're giving you authority to tell the clerk to go ahead and commit execution on judgment that you have rendered. If the Supreme Court tells you've got that, you've got it.

JUSTICE MCCLOUD: To permit execution? I mean, everybody else have reasons and ways to prevent that execution.

MR. SOULES: Okay. Now, mechanics.

JUSTICE MCCLOUD: That why mechanics, you see.

MR. SOULES: As in other cases.

JUSTICE MCCLOUD: Yes.

MR. SOULES: In other cases the district clerk can issue writs of

execution, writs of garnishment, abstracts and all that sort of thing and the parties can act on those unless they're supersedious. Now, one way to get supersedious is to file a dollar-for-dollar supersedious bond. It's automatic. If you put up enough money to cover the principal interest and costs, the supersedious is automatic. The other way they get it under Rule 47 when they go to trial court and say, "Give me some relief. Give me another way to supersede this." And the trial court can do virtually anything as long as it meets the standards of Rule 47 that are set forth, but that's as in other cases. In all cases, in other cases it's either automatic supersedious bond dollar-for-dollar posting of the bond, or there is discretionary supersedious under Rule 47. And if there is no supersedious under one of those ways, then the party with the judgment can at its peril begin execution, and the protection to the judgment debtor is that if the party is pursuing execution that is subsequently proved to be wrong, that party has to replace the sold merchandise or sold goods at their market

value, not at what they brought at the sheriff's sale, and all these things come into play that are the same rights.

Appellate judgment owners or judgment -- the beneficiaries of appellate judgments have no rights right now.

JUSTICE MCCLOUD: I agree with you.

MR. SOULES: Whereas the beneficiary of a trial court judgment has all these right; and I can't understand why. I mean, to me it's fair to give a person with a judgment no matter what court gives them that judgment the same rights both ways.

JUSTICE MCCLOUD: Well, the thing that concerns me -- philosophically you're correct, and there are certainly some -- I'm not saying that there's not a lot of merit to what you say. When I look at 47 and 49 and those rules it's obvious they're speaking in terms of the trial court's judgment. That's what I'm concerned about. If we just up and pass something like this, it seems to me like I don't believe it meshes quite with all of the other rules that we have

out there. I'm not saying this shouldn't be done some day, but I'm saying that if I just ordered my clerk, said "Abstract this judgment and do whatever you're supposed to," you know, and then they turned over to 47 and 49 and those rules are all talking about I think the trial court's judgment, then all of a sudden they've got the Court of Appeals judgment. Mechanically I think you've got some problems.

MR. SOULES: Suppose this as a mental rule and then I'll take this. Suppose this rule, new rule 82a did not say "and enforce the judgment." It just said "Notify the district clerk to abstract the judgment of the Court of Appeals" so at least the owner of the judgment from the Court of Appeals could abstract that judgment and put a lien on the assets of the judgment debtor for the balance of the appeal.

JUSTICE MCCLOUD: Then you've got a lot less problems.

MR. SOULES: Then you don't even get into execution and all those. And as a middle ground at least that's

something. And again --

JUSTICE MCCLOUD: When are you going to take that abstract of judgment off? I mean, later on you've got -- if he abstracts that judgment and then later on it goes to the Supreme Court and then they reverse the Court of Appeals.

MR. SOULES: Then it would be just like if the trial judge -- see, if this had happened in the trial court, if your judgment had been the judgment of the trial court, that abstract would already be on file during the entire process where the Supreme Court reverses it and it come off --

JUSTICE MCCLOUD: By the mandate.

MR. SOULES: -- by the mandate.

JUSTICE MCCLOUD: Uh-huh.

MR. SOULES: And it would still -- your abstracted judgment then if reversed would come off --

JUSTICE MCCLOUD: By the Supreme Court's mandate.

MR. SOULES: -- out of the

mandate. The same process.

HONORABLE RIVERA: If you want to make it to where the Court of Appeals decides on a case-by-case basis that they can be authorized to render judgment and order abstract and/or execution, and they can do it. But that way it won't be automatic. You can ask for it. And if you convince them, you can get it.

MR. SOULES: And "May order the clerk of Court of Appeals to notify the district clerk to abstract" --

HONORABLE RIVERA: Or enforce.

MR. SOULES: -- "or enforce."

MR. BEARD: Well, Luke, the condition of your supersedious bond would have to be changed if your were going to give relief off of that, because it's conditioned to the final appeal.

MR. SOULES: I don't have anything on the table to do that. I don't have anything on the table to do that right now, and I can't write it here. But I don't

oppose it in fairness.

MR. O'QUINN: You say you don't oppose it?

MR. SOULES: I don't oppose the melting of a requirement of a supersedious between the Court of Appeals and the Supreme Court if the Court of Appeals has held that the trial court's judgment is not a valid judgment. But I don't have anything written here to put that forward. I would want to go and think about the language to use on it or have somebody here think about it for the afternoon. But even if we make it discretionary with the Court of Appeals to permit just an abstract, at least that's some help to a party that has a judgment. And right now there is nothing to protect that party, nothing at all.

MR. TINDALL: Luke, can we bring this up in August when we can see how it would work both ways, if you're the prevailing party on appeal and put up a bond, you get your money back; and if you've been denied a judgment at trial court and you now win and you want to execute? I mean, to

me --

MR. SOULES: Who will write that side of it? Somebody on the defense side that would be suffering a judgment, laboring under bankruptcy, or an onerous supersedious has gotten a Court of Appeals to reverse the trial court's judgment and needs out of that problem. I mean, there's bound to be somebody here. I've had it both ways.

MR. TINDALL: The cost may be substantial. Are you going to let a party recover all their costs and immediately seek taxing of those costs against the party that otherwise has won the judgment in the trial court?

MR. SOULES: Doak, do you think you could write the other side of this?

MR. BISHOP: Yeah.

MR. SOULES: Okay. I'm going to assign it to Doak then for drafting. I'm going to leave this just like it is. I've already indicated some flexibility in my mind about how it ought to be done, whether it ought to be discretionary with the Court of

Appeals, whether it ought to be limited to abstract, or whether if it's discretionary go ahead and do both, because the Court of Appeals is going to be able to consider the enforcement or not or the abstract or not. But right now I think I'll leave it before the Committee, but table it until the next meeting just like the language is here, which is the full load, which I'd rather have. But I do have flexibility; and then Doak is going to write the other side of it, and we'll put it on our agenda for our August 12 meeting. We're going to vote on it in August both ways.

(At this time there was a brief recess, after which time the deposition continued as follows:)

MR. SOULES: You have looked at Rule 9, substitution of parties that I circulated around. Any objection to Rule 9? As I circulated it as rewritten by Justice Hecht, there being no opposition to Rule 9 that text will be recommended to the Supreme Court unanimously by the Committee.

Next we circulated a

handwritten, Elaine's handwritten effort as this Rule 49 -- or 47 problem. Please be looking at that so that we can discuss it momentarily. I want to finish the TRAP rules so that we can finish the items that directly involve Judge Clinton's court, and then he is welcome and requested if he likes to stay with us, but he will at least then have given us a long day of his patience in helping us get these appellate rules reviewed.

I suppose then the next item on the agenda will be Rule 90. We did 90. Rule 130, TRAP 130, which is at page 226, 225-226. And let's see. Do we have a text?

MS. HALFACRE: No. It was just held over from the last meeting on Justice Hecht's letter.

MR. SOULES: Oh, that's the general multi -- what is this?

JUSTICE HECHT: This is --

MR. SOULES: This is that question that you're going to submit to us again. All right. We will reassign that to the Committee, and I think Justice Hecht, I believe, has text that he has drafted for

that, and I will get that to the Committee and the Committee will report August the 12th on that.

Okay. The next one is then what?

MS. HALFACRE: Page 236.

MR. SOULES: In order to have everybody informed, this is -- the Rule 130 problem is the case where a party before the Court of Civil Appeals Court of Appeals having lost his case in the Court of Appeals filed an application for writ of error before filing a motion for rehearing. The court held that the filing of the application for writ of error took away the jurisdiction of the Court of Appeals, but since there was no motion the motion for rehearing could not be filed, and since there was no motion for rehearing filed the Supreme Court had no jurisdiction for writ of error. Zing. So we're going to work on that a little bit. This was 225. Justice Hecht has some language that we're going to resubmit to the TRAP subcommittee for a report on August the 12th for further consideration. I just didn't want to leave it unsaid what

that was about and table it.

But that seems to be the better action on that for today. The next item is on page 236, and Judge Clinton wants us to consider changing a heading on --

JUDGE CLINTON: Section 17 and the submission of oral arguments and opinion and then add "in the Court of Criminal." I'm just a messenger on this. I won't waste my time.

MR. SOULES: Judge, since you have come to us as a messenger for your court, I gather, we certainly want to be supportive in every way.

JUDGE CLINTON: It's to make it symmetrical with one of the earlier sections that says something like that in the Supreme Court. That's all.

JUDGE CASSEB: I move we admit.

PROFESSOR DORSANEO: Second.

MR. SOULES: It's been made and seconded. All those in favor say.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? It's unanimous.

Okay. Next page 321, well, that's been done.

MR. BEARD: We voted on that.

MR. SOULES: That's been done. I checked that a moment ago. I should tell you for the record here what page. It's in the completed work of this committee, that is shown on page 35 of these materials.

Next I guess is 323.

MR. TINDALL: Didn't we act on this in the earlier minutes, or is there some change on 166(b) from --

MR. SOULES: Okay. Here's -- the only point here is on page 325. Well, it's throughout, but here's the point. Allen versus Humphreys says that you cannot discover the work product of a consultant who is not going to be a witness. One very serious hearing and others that were not so serious have involved me where the contention was that if a consultant was going to be a fact witness, then his consultant work product

could be discovered. Now to give you that example, suppose your consulting physician who always helps you as a consultant but never wants to give any kind of opinions anywhere happens to observe an automobile accident. The hurt victim comes to you. He's got factual observations of the occurence. He'll consult with you on the injuries, but he will not testify. So if you use him at all then his consultation becomes discoverable. That's a simple way to do it.

The more complex way is the thing I got involved in, and I've been meaning to bring this up and just keep forgetting. We were in nuclear power plant litigation. Our engineers were fact witnesses because they helped design the plant, but they were involved all together in trail preparation. They helped us set trial strategies. We didn't -- it was a fairly complicated engineering and construction job and we had to have these engineers as consultants to us to help us through trial strategies to plan for that trial; and that's where the most serious confrontation about

this came up.

San Antonio -- I was representing Halliburton, Brown & Root. San Antonio made a motion that the litigation support work product of these inside engineers be discovered by San Antonio because these engineers were going to be fact witnesses in the case. Judge Hardy overruled that motion and ruled that their -- that if they were not going to give opinion testimony and they were not providing information to experts who were going to give opinion testimony that their litigation support work product if kept separate from the work they did on the plant up to the time they were terminated, that that was kept separate, would not be discoverable.

So what we've got in this rule, you see, is not clear either. What I have written is to make this rule clear that if a consultant is not going to be an expert witness, then his litigation support consultation work product cannot be discovered even if he is going to be a fact witness. To me it's important, but I'm not sure how you feel about the discoverability of litigation

support work product if it's done by a person who is going to be somehow a fact witness.

So that's the purpose of it and here it is. All it does is add "expert" before "witness" every place in this expert exemption text of Rule 166(b). It's the only new thing to 166(b). We've changed all the other. Anybody have any discussion?

PROFESSOR EDGAR: It seems to me, and I have not had a chance to read it in detail, but just in glancing at it it cures one problem that we now have, and I think this case is presently before the Supreme Court on mandamus where we had an oil field explosion and some of the people who were designated as consulting experts were in fact fact witnesses, and they were designated consulting experts only, and the party employing them thus took the position that none of their testimony was subject to discovery, and that was upheld by the trial court. Now that's before the Supreme Court on mandamus. But it seems like this would at least cure that problem.

MR. SOULES: So it really

cuts both ways to cure the problem.

PROFESSOR EDGAR: That's right.

MR. SOULES: I think it does. Any further dicussion on this?

PROFESSOR BLAKELY: I was just going to ask you can you generalize about what to deal with impeachment? Can you impeach the discovery work product so far as a fact witness? Not expert testimony but as a fact witness. That's the purpose of getting at the work product, I take it, is impeachment.

MR. SOULES: Oh, no. The purpose of getting their work product was just to get our trial strategy.

PROFESSOR DORSANEO: The usual reason.

MR. SOULES: The real reason.

MR. BEARD: I'm inclined to think that the courts ought to take up on a case-by-case basis rather than trying to get a hard and fast rule, because I see the mixing up their facts and expert testimony in a

trial, and I'd be inclined to let the courts take it up as it comes up.

MR. SOULES: You have to identify the person with knowledge of relevant facts if he's going to be a fact witness.

MR. BEARD: I understand that, but I'm not sure that a rule that would exclude the work product from that expert who is actually a fact witness.

PROFESSOR DORSANEO: I think what you've done by adding the words "an expert" in before "witness" is to restrict the expert provisions to persons who are experts up and down the line, and it really kind of in a way leaves the question open as to more complicated situations. To me literally what it says is that we're talking about expert as experts and you have to look somewhere else in the rules to find out that in these provivions to find out about experts or persons in multiple capacities. So I would even though I may agree with what you said or would be inclined to agree with it for the sake of argument I don't have a problem with these changes.

MR. SOULES: Any other discussion on this? Those in favor show by hands? Those opposed. It's approved by majority vote.

Next is --

PROFESSOR DORSANEO: Tom Davis' suggestion on 327.

MR. SOULES: Yes. On page 327 Tom Davis' suggestion is that we --

PROFESSOR DORSANEO: Can we talk to this one?

MR. SOULES: Yes, please, speak to this, Bill.

PROFESSOR DORSANEO: There was a vote last time, I believe, to add if you'll look at page 327 of the booklet, add some language to Rule 215, and I think Tom Davis is not here now.

MR. SOULES: No. He had a funeral he had to go to.

PROFESSOR DORSANEO: Properly suggests that that concept should be dealt with in the first discovery rule rather than in the sanction rule, and I agree with that. 166(b) although we usually think of it

simply as a scope of discovery rule actually is the general rule, and the logical place for this idea is in that rule and not in the discovery sanction rule.

MR. SOULES: Any further discussion? All in favor say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? That's unanimous. We'll move that language from the place where we had first placed it in 215 to a new paragraph in 166(b).

Okay. The next is on page 332. And was this not -- Bill, this is your suggestion. Was that to move that language to someplace else?

PROFESSOR DORSANEO: And I think last time we discussed where do we put this particular sentence; and towards the end of the meeting it moved to Rule 239, and I thought that it would better go in 237(a) because of the title of the rule, and actually in many respects by making that suggestion I'm making a suggestion that it was more of a minority report at the time we discussed this last time. I don't feel strongly about it one

way or the other. I just happen to think 237(a) would be a better place, and I think others thought so too, but they can speak for themselves.

MR. SOULES: I don't have any problem, as long as it's in there, where it is. Do you feel like logically it fits better at 237(a).

PROFESSOR DORSANEO: I think that's probably where I would go read if I was thinking about this problem area.

MR. SOULES: So you would move the language out of 239 into 237(a).

MR. BISHOP: Bill, do you have a problem with taking out the last two words "during removal" and ending the sentence with Federal Court?

PROFESSOR DORSANEO: No. But I think that it may mean something.

MR. BISHOP: What does it add?

PROFESSOR DORSANEO: I think if somebody files an answer in Federal Court after remand, it might bother me, probably wouldn't. I don't see how the

language -- I had a clerk one time who would insist on -- an office clerk insist on people filing things whether they were the right place or not, once filed something for me in the Court of Appeals that was properly filed in the trial court. And upon his insistence the clerk said,

"All right, Arthur, we'll file here. Thank you very much."

MR. SOULES: All right. Those in favor of moving this language out of 239 and into 237(a) say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? Doak, are you wanting to make a motion on that, or does it really matter?

MR. BISHOP: No. Not a big point.

MR. SOULES: Okay. The next item, I believe, is on page 333. And let's see. This is your report, Hadley.

PROFESSOR EDGAR: To kind of reconstruct where we were on this, last time I suggested that at our previous meeting that we do something with the last two

sentences of now Rule 278; and I took the most conservative approach I knew and drafted a change which appears on page 338. At that meeting both Justice Hecht and Buddy Low suggested that perhaps what we should do is examine a method by which we could simplify the concept embraced within those last two sentences, and I was appointed the subcommittee chair and Tom Ragland and Buddy were appointed as members of the Committee; and because of geographical and time constraints I simply sat down and tried to incorporate what I recall Justice Hecht to have stated orally at that meeting and also tried to incorporate what Buddy Low stated, and Buddy also wrote a letter which appears here somewhere.

What I'm really saying is that I'll have to take full responsibility for the suggestion that appears on pages 334 and 335, and I have not had time to discuss this with either Justice Hecht or Buddy or Tom, so basically what we have here is that "If a question, including an element or an instruction or definition pertaining thereto

is omitted from the charge or is included defectively, such omission and defect shall not be grounds for reversal unless its submission in substantially correct wording has been requested in writing intended by the party which relies upon it."

This is on page 334, paragraph number two. Then "The trial court's endorsement as required by Rule 276 will preserve any error related thereto and no further objection will be necessary" making it clear that the party relying on it would not have to tender and also object to the charge but would tender only.

Then in number three if it's not relied upon by the party, then basically an objection will suffice. Now, I have a question about that, but we would also want to include giving the option to that party of either objecting or tendering, but I leave that in abeyance.

Then item paragraph number four, if it's a matter of which is not relied upon by either parties, such as a definition instructions in the body of the charge that

doesn't relate to a question, then it shall not be deemed a ground unless it's been requested and tendered by the party complaining of the judgment and then making it clear that having it endorsed is required by Rule 276 will preserve an error rather than having to object to the charge.

MR. TINDALL: Two is like four.

PROFESSOR EDGAR: Yes.

MR. TINDALL: Hadley, isn't this the present law except for three where you're omitting the old -- and I think disputed in the appellate court where you have to tender the correct definition?

PROFESSOR EDGAR: Well, actually the law is not as clear as one might think. We all think we know what the law is, but there are some cases that lend some doubt to that. And the question is, do we want to try and make it very clear about what we want it to be rather than what some of the appellate courts say it is.

MR. MCMAINS: Hadley, in revising this you've left out all together --

or I was just trying to say. Oh, you put in the "shall not be grounds for reversal" in each one of these.

PROFESSOR EDGAR: That's correct. And as usual, I have no pride of authorship.

MR. MCMAINS: One of the difficulties I have with this whole notion of trying to segregate this way, one of the difficulties we have under the current rule, but I'm not sure it's very clear to me what "matters relied upon by the party," and you're saying in one instance you've got three alternatives, either it is relied upon, it isn't relied upon or we don't know.

PROFESSOR EDGAR: Let's just assume that we have an instruction concerning the definition of preponderance of the evidence.

MR. O'QUINN: Number three.

PROFESSOR EDGAR: That would be number three, because I visualize that as one that's relied upon by neither party because normally you have theories of

recovery and theories of defense and both parties need that instruction with respect to their questions.

MR. MCMAINS: But what you're saying is in that situation that you have to submit.

PROFESSOR EDGAR: That's right. You have to submit.

MR. MCMAINS: An objection to the definition is just not good enough even if the definition is -- even if there is a definition given and it's wrong.

PROFESSOR EDGAR: That's right.

MR. MCMAINS: That the objection is not good enough.

PROFESSOR EDGAR: That's right.

MR. O'QUINN: Isn't that contrary to current law?

MR. MCMAINS: Yes. That's correct. What you have done is put the burden in those types of situations where the Court if they decide to tinker with something if you may not come to court with. It isn't

sufficient that you object. You have got to anticipate that the Court is going to tinker with it and then bring it right and be sure that it's right, because that's where the problem is. Most of the defects in the preservation of error to the charge are in the request error more often than in the objection.

PROFESSOR EDGAR: (Nods affirmatively.)

MR. MCMAINS: Not all together. But it's a lot harder to do the request right than it is to make clear what the ground of your objection is.

PROFESSOR EDGAR: Well, there are certain cases in which I might disagree with that.

MR. MCMAINS: Of course, you don't have any trouble screwing the lawyers either way, but the appellate bench is determined to do so. But all I'm saying -- so you're really saying that the objection practice is really very, very narrow. It's only when the other side is relying on something.

PROFESSOR EDGAR: That's right.

MR. O'QUINN: Hadley, how would you feel about category three that the procedure would be to object --

(At this time the court reporter cautioned the committee member to speak up.)

MR. O'QUINN: Yeah. How would you feel about in number three where nobody is relying, use the objection procedure?

PROFESSOR EDGAR: I have no problem with that. This is what I understood we're trying to do as a result of what was stated and the letter. I don't have any problem with that.

MR. MCMAINS: Because we've shifted now the question of how you do something from the somewhat troublesome question of whether it's there or it isn't there.

MR. O'QUINN: Yes.

MR. MCMAINS: Whether it's theirs or ours or nobody's. That's a total

change in the notion of what it is.

PROFESSOR EDGAR: I think maybe one thing we ought to think about though is that it is one thing to think about the trial lawyer, but I think it's another thing to think about the judge too. Now, there are instances in which the judge has heretofore been given two opportunities to correct, once when the request was made and again when the objection is made, and it seems to me that we at least should consider whether if we're only going to give the judge one opportunity to correct the mistake whether we should require the attorney to give it to the judge in writing rather than simply an objection.

MR. MCMAINS: You mean even if it's the other side?

PROFESSOR EDGAR: No. I'm talking about under category number three if neither.

MR. O'QUINN: That's why you came on the side --

PROFESSOR EDGAR: Yes, I did. But again, I'm not wedded to that, but I think we ought to at least think about it.

MR. MCMAINS: If you're shifting to whose burden is it, I mean whose problems is it, if that's going to be shifting of focus of exactly what you're supposed to be doing, there are many instructions and definitions that may well be applicable to both claims and against.

PROFESSOR EDGAR: Absolutely. That's why you have to include the separte category.

MR. MCMAINS: And so if you object -- for instance, if he gives you a bum definition of negligence, you have a crticism, a primary issue, then to the extent you're concerned the printed answer you have to do one thing. To the extent you're concerned about the primary answer you've got to do another.

PROFESSOR EDGAR: Well, I assume you're going to have a -- you may not have the same definition of negligence, for example, in medical malpractice.

MR. MCMAINS: I understand that. I'm just talking about even whether it's just one.

PROFESSOR EDGAR: I think we have to decide whether as a matter of philosophy we want to recommend to the Court that if it is one which is relied upon by either party then whether we want to allow an objection to suffice or whether we're going to require a tender under Rule 276. And that's the decision.

MR. O'QUINN: Hadley, I thought we discussed this for an hour in the May meeting or longer and we made a decision as to what we were going to do. You were simply going to try to get it on paper for us.

PROFESSOR EDGAR: If you'll go back and read the minutes, you will find that there were many things about what we were going to do, and it wasn't -- I was not given a clear directive on how to draft this, simply try and simplify it and simply have one standard for these three instances or a single standard even though they might be different.

MR. O'QUINN: I don't have my notes from the last meeting, but maybe Luke can test my memory, but didn't we have a

breakdown like one way, if it was in the charge, you had to object to it. If it wasn't in the charge you had to tender, and I remember we had some lengthy arguments about it.

PROFESSOR EDGAR: Well, we had several --

MR. O'QUINN: We could that it was almost never mandatory. We had such a maze of editorial changes that somebody said, Well, why don't we at least before we take the final vote take all of these editorial changes and take these votes and write it out and let's go back and read them and make sure.

PROFESSOR EDGAR: I was not given the mandate to sit down and write out all of the alternative suggestions. It was my understanding that we were trying to simplify.

MR. O'QUINN: Do you remember, Luke, that we didn't actually vote on how we wanted it the last time?

MR. SOULES: John, we voted on a lot of pieces of it, and --

MR. O'QUINN: I do remember we debated and took votes.

MR. SOULES: I've got the transcript here. Of course, it went on for about an hour.

MR. O'QUINN: I thought we had decided.

MR. SOULES: No. We finally got down to the end, and I think just did generally refer it back.

PROFESSOR EDGAR: Recommendation.

MR. SOULES: We generally referred it back with the request that you keep in mind the discussion that had been had where we had been able to get definitive votes or even close votes, expression of consensus, but we never did get an overall resolution. And is it pretty much in keeping with Buddy Low's letter that's here?

PROFESSOR EDGAR: Well, Buddy had some suggestions, and this pretty well tracks it, but Buddy has left I think something out, and I've forgotten what it is. On what page is his letter?

MR. O'QUINN: 340.

MR. SOULES: It's on page 340, I guess.

PROFESSOR EDGAR: For example, Buddy did not include the type of situation included in element number three. He was assuming that either a question, instruction or definition was one relied upon by a party or relied upon by the point, and there are a lot of them that don't fit into that.

MR. MCMAINS: You put magic significance to this notion of relied upon. I'm just saying that we're just substituting here what the focus is, and I'm not sure I understand precisely. It's not defined what's relied upon by the parties.

MR. SOULES: Haven't we historically used "party with the burden of proof" on the question?

PROFESSOR EDGAR: No.

MR. O'QUINN: I think Buddy Low states it pretty well on page 340 when he says in the third paragraph of his letter when any element of a party's cause of

action or defense upon which the party has a burden of proof and that properly includes some question, instruction, definition, when then those matter are matters upon which that party relies.

MR. MCMAINS: I don't have a problem with that.

PROFESSOR EDGAR: The problem though if you'll look at Rule 278 as it's now worded, it says "relied upon," and that is a term I think that has been sufficiently understood by practitioners ever since -- this used to appear in Rule 279. It says "relied upon," and that whole concept is something that with which we're all familiar, because that's the way the rule always read, and I tried to keep that thought in this rule so that parties wouldn't say, "Well, now, that has never been in the rule before. Does that indicate a change?"

MR. MCMAINS: But this is talking about relied upon by the opposing party, and I know you've got that.

PROFESSOR EDGAR: If it's relied upon by the opposing party it's relied

upon by you, one of the two.

MR. MCMAINS: We'll, that's fine if you want to do it in the total disjunctive. The point is you have three alternatives. You don't have opposing parties in court, which is kind of the way you're describing.

PROFESSOR EDGAR: Okay.

MR. MCMAINS: You've got parties, matters not relied upon by a party and then matters not relied upon by either party.

PROFESSOR EDGAR: Okay.

MR. O'QUINN: Take your concept of your definition of negligence which I thought in your statement tends to come under matters not relied upon by any party.

PROFESSOR EDGAR: I think if you need --

MR. O'QUINN: I would submit to you that the definition of negligence is something I'm going to be relying upon.

PROFESSOR EDGAR: If you are the plaintiff in a negligence case and you

need the definition of negligence in order to prevail, then that is one relied upon by you.

MR. O'QUINN: What if both sides are relying upon it?

PROFESSOR EDGAR: Then it's relied upon by both of them and it would be under subdivision two.

MR. O'QUINN: Okay. I'm with you.

MR. MCMAINS: Under (a).

PROFESSOR EDGAR: And you might have a situation in which the defenant is not asserting contributory negligence, so then it would be under three.

MR. O'QUINN: He's to the definitions in support of any case.

PROFESSOR EDGAR: Right.

MR. O'QUINN: So really, the only kind of thing that's going to fall under paragraph four are things like burden of proof.

PROFESSOR EDGAR: That's exactly unless it is a question including an element thereof or instruction or definition pertaining thereto. Then it's going to fall

under number four.

MR. O'QUINN: I understand.

MR. TINDALL: Hadley, are you overruling some cases under number three where you're not relying on it, where not only must you judge but you must tender?

PROFESSOR EDGAR: Yes.

MR. TINDALL: Should we not slay that dragon by saying it is not necessary as an affirmative, state that it is not necessary to tender? I don't know if you completed the ring of what you're saying.

PROFESSOR EDGAR: To me that says it, but if the Committee wants to change it in any way, I don't -- whatever.

MR. TINDALL: To add a sentence "it is not necessary to tender a correct definition if you're not relying upon the definition, charge or instruction."

PROFESSOR EDGAR: All right. Let's come back to that. You'll recall that there is a case --

MR. TINDALL: A Supreme Court case.

PROFESSOR EDGAR: There's a Supreme Court case, and I cited it in my letter at our last committee meeting, and I've forgotten the style now, Morris vs. Holt, in which the court held that if it is not one relied upon by you, that you may either object or tender.

MR. TINDALL: Okay.

PROFESSOR EDGAR: And that's why I stated earlier that perhaps we should in keeping with Morris vs. Holt add here "such omission or defect shall not be a grounds for reversal of a judgment unless an objection thereto has been made by such party or has been requested in writing and tendered by that party," that is, either one with preserving the error rather than just simply relying on objection.

MR. TINDALL: Good.

PROFESSOR EDGAR: Maybe that will clear up the problem that you're having.

MR. MCMAINS: Hadley, a lot of these are termed in terms of a grounds for reversal of judgment, but we really mean

by a party seeking the reversal, right?

PROFESSOR EDGAR: Yes.

MR. MCMAINS: Well, what you really mean is essentially omission or defect shall not be a grounds for reversal of a judgment unless an objection thereto has been made by such party. And what's in the other rule is out, is complaining of such judgment, right?

PROFESSOR EDGAR: Right.

MR. MCMAINS: You just left that out?

PROFESSOR EDGAR: Right.

MR. MCMAINS: I'm just trying to get generally the question of whether or not we've done anything or made at least somewhat obscure what happens if somebody else makes the objection.

MR. SOULES: That's not addressed here, and I think it's a problem.

MR. O'QUINN: What kind of example?

MR. MCMAINS: Co-defendants. One defendant objects and the other defendant doesn't. That defendant may

win and the other defendant looses.

MR. O'QUINN: What happens under your rule in that example, Hadley?

PROFESSOR EDGAR: Well, I think under the way that this is -- the way that this is worded he would not prevail, because he didn't object. He waived his right.

JUSTICE MCCLOUD: It ought to be.

PROFESSOR EDGAR: It doesn't bother me.

JUSTICE MCCLOUD: It doesn't bother me.

MR. MCMAINS: Matters not relied upon by a party, and then it says --

PROFESSOR EDGAR: Unless that objection has been made by such parties.

MR. MCMAINS: It says "shall not be grounds for reversal unless objections made by such party." Well, I say, "Okay. It has been made by that party."

(At this time committee members voiced opinions at the same time, making transcription inaudible.)

MR. O'QUINN: Would it solve it, Rusty, if entitled Matters not Relied upon by the Complaining Party? Would that solve your problem?

MR. MCMAINS: Yeah. Just omission of the language of the party complaining.

MR. O'QUINN: I think what Rusty may be saying is if such party might be incorrectly deemed to refer to the word "party" in the caption as being the appealing party. Is that what you're saying?

MR. MCMAINS: It's this whole thing about not relied upon by a party. It says, If a question not relied upon by a party is omitted, such omission shall not be grounds for reversal unless objected to by such party.

PROFESSOR EDGAR: Secure that by saying "not relied upon by a party complaining of a judgment." Would that solve the problem?

MR. MCMAINS: I think so. I mean where I think it gets addressed in our current. The party complaining of the

judgment is the party that has the burden to satisfy this rule if it is the rule he's trying to invoke. What I'm getting at is, actually what happens is you may well be in a different part of the rule. You could object to avoid being findings to an issue relied upon by you, like for instance, where you're up here on two. And you don't want a deemed finding so you're going to submit the proper issue, but you win even under the defective issue.

What this up here talks about is, says it shall not be grounds for reversal unless a submission has been requested in writing and tendered by the party relying upon it. The party relying upon it did request it tendered, but he also won under the defective submission. All I'm saying is what's the burden of the other party? All it says is it's not grounds for reversal. We don't want a reversal now.

The other party says, "You know, by God, you were right. That was the wrong question. And the right question was the one that you refused to submit by the

party tendering." And he did that, and so it's not an objection to reversing because he did that. You're not entitled to the --

PROFESSOR EDGAR: You can cure that by saying "by the parties complaining of the judgment" in number three.

MR. MCMAINS: Not in three. I would do it everywhere I think. In other words, I just want to make it clear that every party has the responsibility to do what they're supposed to be doing with regard to protecting their complaints on appeal; and as to two, everything that appllies to two, the counterpart for that is really that the people who were on the other side are going to have to go to three. They're going to have to object. I mean, if they agree, the judge is just hell bent and determine to do something that either party wants done, the party relying upon the issue is going to be having to submit and the party opposed to the issue is going to have to be objected.

PROFESSOR EDGAR: That's right.

MR. MCMAINS: And whoever

it is wins, the other one has got to have done the right thing and can't rely on the other one having done the right thing.

PROFESSOR EDGAR: That's right.

MR. MCMAINS: And it doesn't say that yet, and that's all I'm trying to get in here.

PROFESSOR EDGAR: I think it does say that. If it's something you have relied upon, then you're going to have to tender. If it's something that you have not relied on, then you're going to have to object. That's what two and three say.

MR. O'QUINN: I think it solves it at the end of that paragraph number three you say "by the complaining party." And I'm agreeing with you, Hadley. I don't think it has to be put in there to make it crystal clear.

PROFESSOR EDGAR: When you say in number three, though, after -- and on the third line after the word "party," that first word, you say relied upon -- "not relied upon by a party complaining of the judment,"

comma, "if omitted" so and so "shall not be a ground unless objection has been made by such party." And that's what I said 30 minutes ago, doesn't that cure the problem?

MR. O'QUINN: I agree with you. Going to put in the words after the word "party" in line three?

PROFESSOR EDGAR: The parties complaining of the judgment.

MR. MCMAINS: All I'm saying is shouldn't the same change be made in two?

PROFESSOR EDGAR: Where would you put it, Rusty? And I don't have any problem with that.

MR. MCMAINS: Well, the one reference to party is --

PROFESSOR EDGAR: Party relying upon.

MR. MCMAINS: -- parties relying upon. You could put "and complaining of the judgment."

PROFESSOR EDGAR: And complaining of the judgment.

MR. O'QUINN: Hadley, I'm

going to give you a hypothetical in support of an argument you should remove the words "complaining party." What if you had a situation where there was a defense submitted by issues which the plaintiff thought were defective and those issues were answered in favor of the defendant, but the trial court entered an NOV for the plaintiff. Okay. So the defendant goes up, the plaintiff cross-assigns saying that if an NOV is knocked out, I want a new trial, because of the form of the issues accorded the defense were defective.

Now with that posture the plaintiff is not complaining of the judgment. So where does he stand when somebody says, "Okay. This thing says, 'parties complaining of the judgment." You're not relying on as a plaintiff, but you're not the party complaining of the judgment. The defendant was the party complaining of the judgment. It seems like to me just should be that if the issues in question alleging the question is not being relied upon by the parties complaining about the issues, all he has to do

is object and doesn't have to tender.

PROFESSOR EDGAR: All right. In trying to analyze that question, don't we have the same problem under our current rules?

MR. O'QUINN: Could be. I don't know.

PROFESSOR EDGAR: We do.

MR. MCMAINS: Probably do.

PROFESSOR EDGAR: And I'm not sure that we can sit here and will solve every possibly problem that could arise.

MR. O'QUINN: What's the harm in just saying "an issue not being relied upon by the complaining party"? Why does it have to be of the judgment? Whatever party is complaining about that issue, if he wasn't relying upon it, voices complaint by an object.

PROFESSOR EDGAR: I see. All right. Not relied upon -- this is number three.

MR. O'QUINN: Yes, sir.

PROFESSOR EDGAR: Not relied upon by the complaining party.

MR. O'QUINN: The person bitching about the issue wasn't relying upon it. All he had to do is object.

PROFESSOR EDGAR: All right.

MR. O'QUINN: It may be applicable to two. I don't know.

MR. MCMAINS: Yes, applicable if you have one in spite of having been screwed on the charge and of course court goes up and says you weren't entitled the one under the charges given, you're going to be in the position to win on cross, get a remand on the charge of being wrong.

MR. O'QUINN: Where would that go on number two? I don't see any place where it would fit.

MR. MCMAINS: Same place just say give me --

MR. O'QUINN: Well --

MR. MCMAINS: Determined by the parties relying upon and complaining.

PROFESSOR EDGAR: I don't think you need in there --

MR. O'QUINN: It doesn't

seem like. I don't see the point.

PROFESSOR EDGAR: I don't think you need it.

MR. MCMAINS: Well, you have to say "such omission or defect should not be grounds for a reversal of a judgment in favor of such party unless it's submission can" -- substantially direct wording has been -- well, or -- and so do you see what I'm saying?

PROFESSOR EDGAR: Say it all.

MR. MCMAINS: "Not be grounds for reversal of a judgment in favor of" --

MR. O'QUINN: You mean judgment in favor of?

MR. MCMAINS: I meant reversal.

MR. O'QUINN: "For reversal in favor of the" something "of a judgment."

MR. MCMAINS: Of the complaining party in the submission.

MR. O'QUINN: I tend to

agree with Hadley. I'm not sure you need it. I can't think of an example where it won't work.

MR. MCMAINS: You request submission of an issue. Request of submission of the issue doesn't get it. I'll give you another issue. Instead you've got to substantially submit the correct one. You win under the substituted issue.

MR. O'QUINN: All right.

MR. MCMAINS: It turns out to be the wrong issue. The other party is protected under the next subdivision or even maybe there's no evidence to support evidence that the judge did submit. So the judge renders a judgment however for you ignoring this little no evidence problem. The Court of Appeals reverses and you want to get back.

MR. O'QUINN: And I want to try to at least get a new trial.

MR. MCMAINS: Right.

MR. O'QUINN: But I didn't get the right issue submitted.

MR. MCMAINS: Yes.

MR. O'QUINN: I'm not

complaining of the judgment at that point.

MR. MCMAINS: You're complaining -- what will be the judgment of the Court of Appeals.

MR. O'QUINN: That's not what it said.

MR. MCMAINS: I know. Of course, the way this rule is written, it says that defect will not be a ground for reversal of judgment. This rule does not allow that defect to use cross-assignment.

PROFESSOR BLAKELY: Nor should it.

MR. O'QUINN: What do you do for this example where the plaintiff has two liability theories, (a) and (b), the trial court submits (a) but wouldn't submit (b)? The plaintiff wins, but appeal determined (a) was not a valid ground, and plaintiff seeks a new trial on (b). Which one of these rules does it come under?

PROFESSOR EDGAR: It should be number two.

MR. SOULES: What? No.

MR. MCMAINS: I agree.

It should be two, but it ain't there.

MR. SOULES: Wait a minute. That's one.

MR. MCMAINS: There is no one.

MR. SOULES: Okay. Two. May I ask a question? Don't we usually start out when we're trying to tell people about a preservation of charge error by saying a party who has the burden of proof on a question must do something to preserve error in the failure to submit that question? Why don't we just say it that way in the rule? And a party who does not have the burden of proof on a question -- I get lost in some of the language and some of what I'm hearing here seems to me language problems; and of course, Hadley has worked hard to get this. I think the concepts are here, but the way parties have to perfect error is really based on who has the burden of proof on the question on two and three.

MR. O'QUINN: Yeah.

MR. SOULES: And we don't really say that, but we've talked about about it.

PROFESSOR EDGAR: The reason I didn't is because the current rule doesn't talk about it. It talks about whether it's relied upon. And it seems -- and I just felt that the bench and the bar know what that means. And then you start talking about burden of proof, and then lawyers and judges get paranoid, because you've changed something. Now then they say, "Well, is that different now because you don't talk about relied upon anymore? You talk about burden of proof. What does that mean?" And this is an area where people are schizophrenic anyhow, and I was thinking that it might be well to retain as much of the language as we retained to try and reduce or eliminate as much paranoia an we can. That's why I did it.

MR. O'QUINN: My suggestion about the thing, discussion before Luke made his comments is to go to line four of paragraph two and change the words to reversal of judgment to be shall not be a ground for appellate complaint. That would allow it to come in as a cross-assigned complaint, you know, because you can't raise

appellate complaint unles submission substantial.

JUSTICE HECHT: Listening to this discussion and larking back to the discussion very lengthy as we noted we had last time, I just wonder if we're really extracting ourselves from what we all think is a difficult area of the law at a particularly difficult and pressured point of the trial.

If I might just think through this a moment. Nobody knows exactly what they have to do at this point in the trial to preserve error. They're concerned about it. The evidence is concluded. The argument is getting ready to happen. It's not an easy time for counsel, and we're making -- in the past had a lot of rules that were complicated it seems to me by one factor; and that is that because trial judges in this state many times do not have, almost all the time, do not have the clerical and legal staff available to them to prepare the charge themselves or to research aspects of it, they have got to rely upon counsel to do some of that for them. And the trial judge needs to

be protected from sandbagging by a lawyer who does not like the way the trial has gone and decides that he'll try to leave some error in the charge and hope for a reversal later on down the line.

Now, all the Federal Rule requires is that objection be made and that it be specifically made pointing out the defect at the time. Otherwise, you cannot rely upon that on appeal. And that's the same rule that you have with respect to evidence and the same rule that you have with respect to voir dire and many other aspects of the trial.

If the problem is that we want to provide assistance to the trial court by requesting language in substantially direct form, why can't we simply provide in the rule that the trial judge may request a party to do that and then if he either fails or refuses to do so or the language that he requests is wrong, that he can't base an appeal on that rather than trying to decide in the abstract when he's going to have to request language and when he's not going to have to request language.

Is there some merit to an approach where we put -- since this is to benefit the trial judge we move the onus of asking for an overall trial. If it's a comp case if we still have comp cases, if it's a comp case and he feels comfortable with a pattern jury charge and he doesn't need a whole lot else, there's no point really in making somebody request a charge in substantially correct wording and an objection ought to suffice.

But if it's a very complicated charge and a very complicated products case with warranties and negligence, then it might be he could ask for it. If a party asks for it wrong and then later he wants to appeal on that basis, it's going to be in the record and he can't base an appeal on that.

It's a totally different approach to what we've taken so far, and I agree with you. I think Hadley has done a good job of trying to segregate out the categories here. But have we really extracted ourselves from the mire of a lawyer sitting

there at the charge conference looking down at this rule that now has four parts to it and thinking "Where in the world am I on this particular issue?"

PROFESSOR EDGAR: Just a couple of observations that I'd like to make to that. First, if the trial judge does not have adequate support staff, and I agree with you that that's the case, then it seems to me that that would speak for requiring the lawyer to aid the court in the preparation of the charge which comes before the objection part, and that it would seem to me to require the lawyer whether one an issue relied upon by him or not relied upon by him to make a tender. Now that seems to help the judge who doesn't have the proper staff.

On the other hand, in the Federal practice theoretically you don't know what the charge is until after the court gives it, and in our practice you -- I mean, before argument and in our practice you do. And so it seems to me that what you're doing also is requiring a lawyer who does not have the burden open the question to perhaps under your

scenario as I invision it to maybe in some instances make a tender.

JUSTICE HECHT: Right.

PROFESSOR EDGAR: And it seems to me that that philosophically maybe imposes a greater burden on a party that does not rely upon it than we should require, because if it's not your question, then why should you labor under the burden of having to present a proper question to the court in order to help the other party avoid a reversal? I'm somehow philosophically opposed to that.

JUSTICE HECHT: And I am too, but in a general charge to which we are moving more and more it's hard to tell which is whose question and which is somebody else's question, which is whose issue and which is somebody else's issue.

HONORABLE RIVERA: Put both of them together --

MR. MCMAINS: And that's what Hadley has tried to address.

JUSTICE HECHT: With respect to aiding the trial court, first of

all, a lawyer who wants to win is going to try to give the judge, I would think, as much aid as he can possibly give him including writing the whole charge for him if the judge would let him. "Judge, I'll just give you my issues and everybody's issues."

MR. O'QUINN: We've done that, haven't we, Luke?

MR. SOULES: I like to do that. I sure try hard.

JUSTICE HECHT: And if a lawyer isn't worried enough about his case to do that, then I'm suggesting the trial judge should certainly request him to do that. And if he refused to do it or failed to do it, and does not otherwise object to the charge, then he's not going to be able to predicate an appeal on that, on any error in the charge.

MR. BEARD: Hadley, as I understand what you're saying that if there are errors in the charge and you made a clear objection to that error, that unless you submit the correct one, you're out. We always should be able to clearly --

PROFESSOR EDGAR: It

depends on whether you're or not --

MR. BEARD: It doesn't make any difference which if you're pointing out an error in a charge and make it clear to the Court and the Court doesn't change it.

MR. O'QUINN: That's not so.

MR. SOULES: Bill Dorsaneo has his hand up.

MR. BEARD: You always submit your issues.

MR. SOULES: Bill has got the floor.

MR. BEARD: But whatever the Court does if you get one and it's got an error in it and it's --

MR. SOULES: Bill Dorsaneo.

MR. BEARD: -- under our present rules.

MR. SOULES: If you-all want to debate off to the side, please leave the room. Bill Dorsaneo has got the floor.

PROFESSOR DORSANEO: I'm just sitting here listening this whole time

and I listened to the last discussion and went through the excercise we went through last time, and I end up thinking fairly much along the lines of Justice Hecht, that the principal mechanism for preserving a complaint ought to be a clear objection to the charge regardless of whether we're talking about a question, an instruction or a definition and regardless of who relies on it in some sense. If the objection to the charge is that there is something missing from a question, from the definitions, from the instructions, then I think most lawyers will want the charge to be worded in a particular way, likely would be inclined to accompany their objection with the appropriate information that they want included. That's the normal way people would be expected to act, and it has struck me as odd for some time that our practice in fact says that that is inappropriate to combine your objections and your requests; and I would ask Justice Hecht if I understood him correctly, would it be the case that the judge is meant to ask for assistance basically in that situation when there isn't something

already on the table to shoot at from the standpoint of an objection.

I think that approach leaves our past behind us where it really is appropriate for the past to be in light of our modern scheme of combining everybody's elements and causes of action together and by not preserving distinctions between what questions do and what definitions and instructions do. The simplified approach makes the most sense to me, and I think it could be drafted up.

MR. SOULES: What's the sense of the Committee?. Should we try to get a revised Rule 278 that makes the objection the operative error preserving vehicle and doesn't really deal with requests of particular requests and substantially correct form language? I guess if we get -- if we're going to be rewriting the old scheme, then Hadley has got that to do. If we're going to be writing towards a different scheme, then Hadley has got that to do, or do we want to adopt this? We can do that too. I'd like to get some sense of the Committee whether we

should try to make -- get to the point where an objection is at least for the most part if not all together the operative preservation of error vehicle.

JUDGE CASSEB: If your primarily purpose is to help the trial judge, then I think the objection should be made and a suggested issue or instruction should be submitted also in order for you to preserve anything. I travel all over the state as you know, and the courts in some areas frankly the lawyers write the charge and bring it to the Court and he looks at it. "Fine. That's the end of it." So to do what Justice Hecht wants to do, say that the court makes the request, I think that's putting something on the Court that he really is not even knowledgeable of at the time. I say this: If it's raised to the Court at that time, then the Court can say, "Well, you bring me, in support of your objection you bring me a suggested deal." Now, that's if you're going to do that and follow that type of concept, then in my opinion you're really helping the trial judge to get a correct charge.

MR. SOULES: Newell Blakely, then Elaine and then Rusty.

PROFESSOR BLAKELY: Before I vote I'd kind of like to know how specific an objection must be, an objection charge. If it's fairly specific it's virtually synonymous with the tenor.

MR. SOULES: It has to suggest what the correct language would be in order to be specific enough to make a good objection.

PROFESSOR BLAKELY: Specificity you're virtually tendering it.

MR. SOULES: I think that's a good observation. Elaine, you're next and then Rusty.

PROFESSOR CARLSON: There are two points I want to bring up on the subject. One is, in CLE on the charge where the procedure says you ought to have the charge before you begin your trial. Secondly, in my hours of reading the local rules I notice that a lot of courts had local rules that require parties to tender at the pretrial stage to court, at pretrial conference a

proposed tentative charge or at some time later an announcement of ready for trial. Maybe the thought should be move up the charge or propose the charge earlier in the proceeding and objections.

MR. SOULES: There's a good idea. You're thinking about having a rule that would say that the proposed issues, questions and instructions have to be tendered at some point earlier than at the charge conference.

PROFESSOR CARLSON: Address at some point to ask for tentative.

PROFESSOR EDGAR: I am opposed to that. For example, the --

MR. SOULES: Okay. Rusty is next and then Hadley.

MR. MCMAINS: That's okay.

MR. SOULES: Rusty yields to Hadley, so it's Hadley.

PROFESSOR EDGAR: I noted, for example, the Dallas rules require that, but the trial judges say they need only your questions. They don't need your opponent's

questions, so you really haven't solved the part of the problem that we are attempting to address.

PROFESSOR CARLSON: You still would leave the objection problem. We can't address the objection problem until it's --

PROFESSOR EDGAR: Until you know what the evidence is.

MR. MCMAINS: I have a problem. With an attempted unified approach of saying you either only object or you only request, which as I understand it is what you were kind of leaning toward characterizing the issue, Bill was talking about --

MR. SOULES: I'm not leaning. I'm just inquiring.

MR. MCMAINS: In terms of trying to fork off and see which way you can solve it I really do have fundamentally a philosophical problem with having to assume the burden of preparing my opponent's instructions. He may have a theory or in many cases I'm the one asserting the theory. I'd be delighted for him to prepare it if he could

figure out better what my theory was and then I'll sit back and say, "Well, it's his charge." So if I can win on that issue I can live with it.

I mean, I really have a problem with putting any burden on a party to prepare somebody else's charge. On the other hand, if you're in fact, if what you're trying to get the Court to ask and want to formulate and base the judgment on in some manner I don't see how only an objection process you don't go into the charge conference and tell the judge after you've rested your automobile intersection case, you just say, "Okay, judge. What issues are you going to give me?" And then just stand back and object. "Well, I've got some other here. I have some other ground, and let me tell you. I think I have this, this and this" and let the judge prepare it, because that puts a burden on the judge that he really doesn't have under our current practice and probably ought not to have. He doesn't just get to listen to the evidence and make up what he thinks is going to be there and everyone just sits back and figures out

what they're going to do by objecting to it.

So, I mean, there really is in my judgment a good reason why this whole notion of whose burden is it is in there, because it's your case. And secondarily with regards to this entire notion that somehow you've got to request if you go any other way, the problem then is that you've got to have a way to object to something on having no evidence to support it or no legal basis in fact or whatever. You've got various and sundry procedural rendition theories that you can effectuate at the charge stage which a mere submission practice or requesting practice will not get you to. You've got to say that question ought not to be there, period, and you need to have a process to say that by way of an objection. I don't think you can eliminate philosophically or pragmatically the dichotomy that we have between objections and requests. I do think we do need to simplify and we're working on it. Hadley has worked toward that, of simplifying when you have to do one or the other, and that you should never have to do

both, and I think he drafted this with that in mind. Am I right?

PROFESSOR EDGAR: Right.

MR. MCMAINS: You should know as clearly as you can when you have to do one, when you have to do the other, and you have to know that you don't ever do both of them or have to do both of them. The careful lawyers are always going to do both of them, but and that practice is not probably going to change, but I really think that going to some kind of unified approach ignores a lot more of the realities that have built up in our practice, legitimately so, and I don't think we can handle this by solely an objection or solely a request. And so then the question is, how do you distinguish where you do it?

PROFESSOR EDGAR: That gets back, it seems to me, to the difference between the federal judiciary and the state judiciary, and I want to pick up on that. The federal judge has two or three clerks that are attorneys that are sitting there helping the Court. And at the conclusion of the evidence the Court is in the position to say, "All

right. This is the charge. I'm going to submit."

The state judge doesn't have that luxury. And I think it would be unfair and I'm trying to pick up, I think, on what Judge Casseb was saying a while ago, that it would be extremely unfair to sit back and say, "Okay. Judge, now you show me the charge you're going to submit and I'm going to start objecting to it." I think the lawyer has to assume some responsibility in putting this charge together, and I see a problem unless we can give our state judges more help in trying to implement a unified approach.

MR. MCMAINS: The problem I think Hadley's has attempted to solve and done a pretty good job of doing is the new problem inserted by the advent of a more general charge where alot of the elements of the claim are not in the question, whereas now our rules are constructed that your burden to submit or object depends upon whether it's a question or something else. He's changed that focus to it depends on whether it's yours or somebody else's.

PROFESSOR EDGAR: Or nobody's.

MR. MCMAINS: Or the Court's, and that is a movement and at least a fair direction you ought to be responsible for your case and you ought to be sensitive to the fact that the other side is not going to be terribly sensitive to your case, and so you should be prepared to object, but you ought not to have to be entitled or required to prepare what the other side is doing, which a lot of times you don't know about until it's over; and I think the movement that Hadley has made is a good movement. I think in terms of the general charge I think it makes total sense if you have got all kinds of theories, however weird they are and the judge is inclined to submit them, the other party ought not to have the burden of trying to explain what they are when you are actually taking the position that they don't exist.

PROFESSOR DORSANEO: I don't want to belabor this, but if you look at -- we're talking about -- I don't know what number we're talking about. We're talking

about objections in Rule 278. The other rules before that talk about "either party may present to the court requests, written questions, definitions and instructions." It strikes me that nothing much is going to be altered about what happens before a proposed charge is prepared by a procedure that says you preserve your complaint by making it an objection, and if your objection is there is something missing, then in order to make your point clear, if the judge asks you'd have to tender something that would be the appropriate thing you would want.

This business about preparing the charge for somebody else and doing all of that, I listened to all that, and it's presented in an earnest fashion, and I'm just not buying it.

MR. SOULES: Okay. The Chair is going reset this for the August 12 meeting, and I would like to expand the Committee to those poeple who have been most active in today's discussion. Is that okay with you, Hadley?

PROFESSOR EDGAR: Sure.

MR. MCMAINS: And that would be Rusty, Bill, Pat Beard, Hadley Edgar, John O'Quinn and anyone else who wants to put their hand up right now; and when we come back on August the 12th this Rule 278 will be the first item on the agenda to be followed by Rusty's work on the other major point, and then we'll finish whatever else we have, but try to get, capture all of these ideas.

PROFESSOR EDGAR: Before we leave then, do you want me to chair the committee?

MR. SOULES: Yes.

PROFESSOR EDGAR: Before we leave I want to ask each member that's been appointed to let me have in writing within one week their suggested changes.

MR. SOULES: By next Friday mail to Hadley what you think the language of Rule 278 ought to be, and then at least you'll start -- and copy to each other, want to make a note of Rusty, O'Quinn, Hadley, Beard, Dorsaneo. I'll serve. Does anyone else want to serve on the committee? Okay. That will be the committee.

MR. BEARD: We're talking like we are preparing something for people that have never been in the courtroom before, don't know what they're doing? We're talking about people coming to court to try cases that haven't prepared their special issues or charge?

MR. SOULES: That's the assignment. The issue is passed to the first item on the August 12 agenda.

Now we're going to go to Rule 47. Elaine has written this in longhand, but it's pretty easy to comprehend. She has taken Paragraph B of TRAP 47 and divided it into two subparts. The first subpart starts, As to civil judgments rendered in a bond forfeiture proceeding a personal injury or wrongful death action, a claim covered by liability insurance or a workers compensation claim, those are the types of claims that are excluded from the coverage of the new statute. As to those then she tracks the present rule. Those actions are already governed by the present rule, so that is no change to those kinds of actions.

MR. MCMAINS: Right.

MR. SOULES: Then she says, As to civil judgments rendered other in a bond forfeiture proceeding of personal injury, wrongful death action, claim covered by liability insuranace or workers compensation claim, that means all the actions that are now covered by the statute, she uses the language of the statute. So what she's done is take the cases that are covered by the statute or governed by statutory standard we've made that a part of our rule. The cases that are not governed by the statutory standard are made the subject of our present rule which is the way the law is anyway.

It's pretty straightforward and clean. I can type this as it is. She's underscored the changes that she has made. Is there any further discussion now on this Rule 47 as she has written and proposed?

JUDGE CASSEB: Move for adoption.

MR. SOULES: Those in favor say aye.

ADVISORY COMMITTE: Aye.

MR. SOULES: Opposed? This will be unanimously recommended to the court. Thank you, Elaine.

(At this time there was a brief recess, after which time the hearing continued as follows:)

MR. SOULES: Rule 308 on page 352.

PROFESSOR EDGAR: What page?

MR. SOULES: Page 352.

PROFESSOR EDGAR: This is one of mine, I think. This is one I received late last week, and I think it came from Harry Tindall.

MR. TINDALL: It did.

MR. SOULES: And I'm going to let him explain because I haven't had a chance to pass it to my subcommittee.

MR. TINDALL: We've kicked this around in the Family Law section for years. This is a rule that's been on the books since 1950. The only way you used to be able to enforce a divorce decree was by

getting a court to appoint a lawyer to go down and file a contempt action; and its time has sort of passed by, but because the code, the Family Code has allowed many more remedies about income withholding, judgments, bonds, all kinds of things. And so this would simply say that when the Court has ordered child support with added issues of visitation, then they can appoint a lawyer which is exactly now. If he thinks that there is a violation, then he can proceed for enforcement action under Chapter 14; and if there is such a violation, the Court can enforce under 14. And that is the only change.

The old rule is poorly written, talks about putting the burden on the party with the show cause. You can't do that constitutionally. It's limited to contempt, and I have run this by Ken Fuller and other members of our section. I think it's pretty well agreed to by everyone.

PROFESSOR DORSANEO: Why do you even want a Rule 308?

MR. TINDALL: Well, because it is very much alive and well, Bill.

People wander into the courthouse to this day in Houston, Texas and ask for a lawyer to help them on their divorce decree, enforcement. It's very much alive and well. Judge Casseb can probably speak certainly.

JUDGE CASSEB: They come out.

MR. TINDALL: They come to you wanting a lawyer appointed, so it's very alive. We'd like to get rid of it.

PROFESSOR DORSANEO: So are fire ants.

MR. TINDALL: No. But, I mean, it is so much alive and well and it's very institutionalized in certain counties.

MR. SOULES: How does this help you?

PROFESSOR EDGAR: What this does is eliminate the problem of enforcement of the decree and limits it to the parent/child relationship.

MR. TINDALL: That's right. Both for support and visitation, and too, then you're given all of the remedies under Chapter 14 which are far more better

than contempt, and you can get an income withholding ordinance.

MR. SOULES: Okay. And the Family Law section approved this?

MR. TINDALL: We're signed off on it.

MR. SOULES: You're signed off on it.

PROFESSOR EDGAR: I just have one question. The last sentence says "a fee may be collected as cost by judgment or both."

MR. TINDALL: Yes.

PROFESSOR EDGAR: If it's by judgment, then isn't it part of the cost?

MR. TINDALL: Well, the old rule, Hadley, if you'll look in the book --

MR. SOULES: The court reporter can't get the transcript with the side talking.

MR. TINDALL: The old rules said that you could get -- your fee shall be assessed against the party and collected as cost, whatever that would mean.

That always seems strange that you would collect your fee as cost to court. We kept it to the extent that purportedly you can keep them in jail until they pay court costs. But we've also allowed it by judgment.

PROFESSOR EDGAR: My question is what's the difference?

MR. TINDALL: Oh, you can keep them in jail.

PROFESSOR EDGAR: No. No. No. My question is, when you assess something as costs, isn't that in the judgment? Doesn't the judgment correct what the costs are and require the costs be paid? I'm just concerned about what the difference between as costs and by judgments means.

MR. MCMAINS: Is this a new judgment? Is the cost referred to I think is what Hadley was questioning? Is the cost referred to mainly somehow costs of the original?

MR. TINDALL: No. No it would only be the costs for enforcement.

PROFESSOR EDGAR: The attorney fee, I presume in the preceding

sentence.

MR. TINDALL: That's right. And if you have it taxable as cost, then you can keep them incarcerated intil it's paid.

PROFESSOR EDGAR: Isn't that in the judgment?

MR. TINDALL: Well, if you only have a monetary judgment, then you don't have the right of incarceration.

PROFESSOR EDGAR: We're missing something.

MR. TINDALL: Okay.

PROFESSOR EDGAR: We're talking about the fee.

MR. TINDALL: Right.

PROFESSOR EDGAR: And you say the fee may be collected as cost by judgment or both, which makes me believe that there's a difference between it being as cost and by judgment.

MR. TINDALL: There is a difference.

PROFESSOR EDGAR: Oh.

MR. TINDALL: There is a

difference. When the judge says, "I find you in contempt of court. You denied visitation or you didn't pay child support." Judge Casseb, you can explain it better than I can.

MR. MCMAINS: Talking about the fee.

JUDGE CASSEB: You're talking about what means then by a judge and you can have judgment against that other person just like you'd have a civil judgment for so many dollars.

PROFESSOR EDGAR: Yes.

JUDGE CASSEB: That's what he's talking about. That's the difference. The other is he's --

MR. MCMAINS: What does cost of what? Cost of --

MR. TINDALL: That's right. The attorneys --

PROFESSOR EDGAR: This says a fee may be collected. It says "a fee." See, Harry, the last sentence?

MR. TINDALL: Well, all right.

JUDGE PEEPLES: Taxed.

PROFESSOR EDGAR: Can be taxed as cost, and he has to pay it before he gets out of jail.

MR. TINDALL: That's right.

PROFESSOR EDGAR: But isn't that in the judgment?

MR. TINDALL: Well --

JUDGE PEEPLES: No.

MR. TINDALL: -- no. It's different.

HONORABLE RIVERA: It can be the judgment that says that you're entitled to recover $100 in fees and execution of the issue. The other one says that you're entitled to recover $100 and taxed as costs and then go to jail for that but not for a judgment.

JUDGE CASSEB: Or a civil debt. You go for the costs.

JUDGE PEEPLES: I don't know why the winner in a contempt would want a judgment if the judge is willing to tax it as cost and put him in jail.

MR. TINDALL: Yeah.

It's -- I put it in because it's now in the code and we're trying to conform the two. You'd want it as costs.

JUDGE PEEPLES: Sometimes a lawyer in his or her own name will get a judgment against an obligor as opposed to the client.

MR. TINDALL: Right.

JUDGE PEEPLES: I don't see what the objection is in having it this way.

PROFESSOR EDGAR: I was just concerned about whether or not they were different, and apparently they can be different, and that was the question.

MR. SOULES: Apparently the judge can enter a judgment taxing the fee as costs and there are certain ways to enforce costs.

PROFESSOR EDGAR: Outside of judgment.

MR. SOULES: Outside the ordinary judgment procedure, or the judge can enter a judgment that the lawyer recover from the party a civil judgment money judgment

which is enforced by execution and other process, and this provides that either way is okay, and I guess that's the way the Family Bar wants it, and it seems like they're just alternatives to get the money.

MR. TINDALL: That's right.

MR. BEARD: Does this contemplate that the Court can appoint any member of the bar and he has the same duty as the deputy?

MR. SOULES: Harry, do you recommend these changes?

MR. TINDALL: I recommend it.

MR. SOULES: And is there any controversy in the Family Bar about it?

MR. TINDALL: No.

MR. SOULES: Do you know of any reason why --

MR. TINDALL: I circulated it. The reason what's in the book has been cleaned up to what you have before you today.

MR. SOULES: This two paragraph is just --

MR. TINDALL: Complete substitution.

MR. SOULES: Deletes the red lining and that is the full text of the rule as it would be rendered finally by the Court?

MR. TINDALL: That's right.

MR. SOULES: Any further discussion?

JUDGE CASSEB: I move for subtitution, because it's very helpful.

MR. SOULES: All right. It's been moved by Judge Casseb. Those in favor say aye.

ADVOSORY COMMITTEE: Aye.

MR. SOULES: Opposed same sign. It's unanimously approved.

The next is -- let me turn your attention to page 350 where Sam George wants notice of proposed judgments. We worked that through --

MR. TINDALL: I think we've adopted that.

MR. SOULES: We worked

that through in the changes to 305 which appear on page 74.

MR. TINDALL: Right.

MR. SOULES: The only thing that we did not do really, I think, that he wants is to put in a ten-day fuse. I have some concern about that, because we may need a judgment quick, and a judge may say, "Okay. Here it is, and I'll see you back here this afternoon. If you've got any problems, let me know." And I'm not sure that we want to put a rigid 10-day turnaround on proposed judgments because of all the reasons why a judge might be needing shorter than 10 days, but we do require notice now because of what was done in 305 that the Supreme Court adopted. So is it the sense of the committee that we need to do more in response to Sam George's request than what we did already at page 74? No one feels that we need to do more at this time?

All right. Then the suggestion of Mr. George, Sam George to the extent that it's addressed by 305 we've done and for the balance I guess we'll get some experience with new Rule 305 before we address

those concerns. If they need to be addressed later, we'll deem them rejected, those that were not solved by 305 at this time. All in favor say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? Okay. This disposes of Mr. George's request page 350. And what is next?

Next is at page 356.

MR. TINDALL: This fell in my domain. Luke, this is kind of a nifty suggestion, although I think I'm going to defer to Bill Dorsaneo, and I think Rusty has worked through these time tables many more times than I have. It would percolate through scores of rules, but basically she wants to view the world on a seven-day cycle, so that if something happens on Tuesday, you calculate four Tuesdays from now as the deadline. She says Alabama has gone to this. It's evidently an English system of court computation. On page three of her letter she notes the number of rules that it would change.

PROFESSOR DORSANEO: I'm ready to vote.

MR. TINDALL: Rusty, do you agree that this is very tricky to get into all these time tables? And I'm not sure it's going to solve all of the problems. Something could happen on Thursday and then next Thursday is Thanksgiving, so you still --

MR. MCMAINS: Well, I tell you, the general reaction of the bar is going to be, "Wait a minute. You're taking 30 and changing to 28?"

MR. TINDALL: There's one minor precedent. We did change the TRO from 10 days to 14, but that's not computation and none of the rules otherwise. We have always been to the 30-day, 10-day notice for this and --

MR. SOULES: What's your suggestion, Harry?

MR. TINDALL: That we reject it.

MR. SOULES: Motion has been made that the proposal at page 356 be rejected.

PROFESSOR DORSANEO: I'll second it.

MR. SOULES: Seconded. All in -- those who favor rejection say aye.

ADVISORY COMMITEE: Aye.

MR. SOULES: Otherwise say no. Okay. It's unanimously rejected.

Next?

MR. TINDALL: Next is 361. I do not know. This is from -- it may be perfectly okay. I can't understand what they're saying. This comes from the Oil, Gas & Mineral Section of the bar. And you see the underscoring on the page 361 of the materials in terms of what happens following a citation by publication. I don't have experience in this area of the law, and I'm going to defer to the Committee on this one.

MR. SOULES: Who wrote this in?

MR. TINDALL: This was done by Skipper Lay, I believe.

MR. SOULES: Do we have a letter to support it?

MR. TINDALL: I think it's on page 363.

MR. SOULES: 363, yes.

MR. TINDALL: He doesn't really say in his letter what they're getting at.

PROFESSOR DORSANEO: What does that mean in English?

PROFESSOR EDGAR: What if you have an oil and gas lease?

MR. TINDALL: That's what I'm reading. I couldn't understand what they're getting at.

PROFESSOR EDGAR: You can't suspend, rescind a lease, but judgment against the plaintiff get the proceeds from the rental or whatever from the lease.

MR. BEARD: That's just making his title good, citation by publication. I think he ought to carry all those burdens, set aside ought to be set aside.

MR. TINDALL: We could certainly -- I could get in touch with Skipper Lay -- I know Skipper -- and ask him, say, "I don't fully understand what you're getting at," what the problem is if anyone else.

MR. SOULES: I think we

need a brief on this.

MR. TINDALL: I'll call Skipper.

MR. SOULES: I don't know how long a brief, but I think we need some kind of brief, because I don't know why it's needed. I guess this depicts a problem, but I can't -- I'm not sure I see the problem. I guess some problem is pretty obvious, oil and gas thing.

Could we -- Harry, could you write him and ask him to do a brief on this --

MR. TINDALL: Yes, I will.

MR. SOULES: -- of what problem he's trying to fix? And maybe he's got some case law that is a problem, but maybe it's not bad case law either. I don't know. Okay. You're going to contact.

MR. TINDALL: I will be back in touch with him on that.

MR. SOULES: For now let's go ahead. I'd like to go ahead and act on it, and then if it comes back -- if he comes back

with a brief, then he will also come back with a new proposal.

MR. TINDALL: I move that we then reject it.

MR. SOULES: We're going to at the time without further information act to reject this. At least that's the vote we're about to take with obvious invitation to give us as much information as they care to give us in the future and resubmit it if they wish. Those in favor of that action say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? That's unanimously rejected at this time.

MR. TINDALL: One more rule on page 367 which purports to codify what is required if you are seeking a new trial to set aside a default judgment, and it goes on page 367 over to 368, and there's a Bar Review article that Aaron Jackon has written on this. I am reluctant to make any recommendation on it. As I recall there was a case, Judge Hecht, the Court ruled on this week, did it not, about once a default judgment as opposed to a default judgment

or --

MR. SOULES: Post answer and pre-answer?

MR. TINDALL: That's right, when you just don't appear at trial but there's an answer on file. And I --

JUSTICE HECHT: Well, as you well have noted there's been a couple of cases this spring in which there has been a footnote in the Supreme Court opinion that indicates that the Court is not -- has not passed on whether after there can ever be a requirement showing a meritorious claim of defense in response to trying to set aside a default judgment or trying to obtain a bill of review. So you've got that problem in the first paragraph of the rule.

MR. TINDALL: We might ought to let the case law shake out on this. I don't know of any reason to move on it at this time, Luke.

MR. MCMAINS: I also don't think -- this is all the reasons why you set aside these. This is a special -- this is one aspect of the default.

PROFESSOR DORSANEO: Stick with the equitable mode.

MR. MCMAINS: There are noncredit motions as well, and this would suggest file a motion for new trial and a motion to set aside the default. That to me creates a real dichotomy, that is, it creates a problem there.

MR. SOULES: Why don't we -- this is fairly extensive. It's a proposed new rule. Is this something we're ready to act on now, or do you-all want to put this over to the 12th?

MR. TINDALL: Let's move it to the 12th.

PROFESSOR DORSANEO: Okay. Let's move it to the 12th. We all have in mind now what this man is trying to do. He's written apparently extensively on it and given it a lot of thought.

HONORABLE RIVERA: He was the attorney in the Southland case. That was tried in my court, and that's his problem.

MR. SOULES: He lost the case.

HONORABLE RIVERA: He won on appeal, but he had no testimony, so the judge granted on affidavit it's good. And this is what he's trying to do. He shouldn't be forced to bring a witness. In this case it was somebody that had gone broke and he had come in and taken over and "I can't even find my clients but I've got an affidavit from the insurance adjustor, and it's good, and we've got a reversal on it. Can't do that. You have to show something. There's an affidavit from the insurance adjustor. I've got the citation and put it in a drawer and I went on vacation and when I came back and looked into the letter the secretary went on vacation. Before we knew it, 30 days were gone."

PROFESSOR EDGAR: Hasn't the United State Supreme Court -- also due process problem when you require meritorious defense?

MR. TINDALL: Yes.

JUSTICE HECHT: That's an open question.

MR. SOULES: All right. Could you maybe scrub this out a little bit?

MR. TINDALL: Yeah. I'll check it out.

MR. SOULES: Reset to August the 12th.

MR. TINDALL: One other, 394, Judge Hecht has raised an issue that I raised here two years ago. As I read it, you're saying about -- this is a strange rule. I don't think anyone has ever -- I think these rules have been around since -- I'm not sure. It's Rules of Practice & Procedure in certain district courts, your administrative-type rules, and they're buried back here really at the end of our rules before we get off -- well, it's at the end of the rules where we went to appeals about exchanging benches; and Judge Hecht raised the question should there be a general rule for multi-district litigation generally and should these rules presribe for Federal courts.

MR. SOULES: Harry, we decided to appoint -- I'm sorry. I don't mean to interrupt you, but I think we decided and have appointed a committee to come up with multi-district and multi-county rules.

MR. TINDALL: Okay.

MR. SOULES: And this probably has been resolved for future action.

MR. TINDALL: Okay. That's all that is between 315 and 330.

MR. SOULES: What's next? Page 396, Elaine, I think this is your report on 396 which deals with Rule 749(c).

PROFESSOR CARLSON: 749(c). As I set forth in our opinion letter we have tried as a subcommittee to obtain what the problem was. We're addressing and currently raised Walker versus --

(Committee members speaking at the same time rendered transcription inaubible).

PROFESSOR CARLSON: -- but unpublished appellate opinion, and looking at the points of error the sub-committee was not comfortable that we were able to ascertain the problem to apparently or properly address it, so we just begged off for the time, and it's been tabled until we have a clear picture and see what it is.

MR. SOULES: What is (c)?

I see. They say pauper has to before he can resist annual FE&D has to pay a month's rent.

JUSTICE HECHT: Before he can appeal.

MR. SOULES: Before he can appeal. That may be kind of like the new county rule and the one that said the woman that got married had to join her husband. That may not be something that we can really carry too much longer in the text of the rules. It looks to me like it may be a small problem. Let's see. It's Rule 749(c)?

PROFESSOR CARLSON: Apparently from looking at the complaint writ granted on the pauper's affidavit did not comply with the rule and don't believe considers apparently proper pauper's affidavit, so the litigant got -- certainly 49(b) to certainly 49(c). I suppose triggered, got triggered.

JUSTICE HECHT: It's true that the points of error on which the application was granted as set out in the Supreme Court judgment do not reflect all of the issues that were raised and briefed in the

case, but the issue very simply is under Rule 749(c) as in most instances a pauper can appeal by filing an affidavit. However, it then goes on to provide that when the case involves nonpayment of rents such appeal is perfected when both paupers affidavit has been filed and one rental period rent has been paid.

Well, query, if he's complied with the pauper requirements by filing an affidavit, can he still be required to make a deposit of the rent? So it's a curious provision of the rule.

PROFESSOR CARLSON: Supersedeas, I suppose.

JUSTICE HECHT: Because supersedeas is provided for elsewhere in this series of rules. This is the appeal bond. To supersede he also has to put one month's deposit in the registry. That's a different issue.

MR. SOULES: Do you-all have a rule book? If we could look at this, I think we could probably get this done or decide whether we want to do it anyway.

749(c), first paragraph is stays. Picking up there though, "when pauper's affidavit has been filed in lieu of an appeal bond" and so forth. "However, when the case involves a non-payment of rent such appeal is perfected when both the pauper's affidavit is filed and one rental period paid."

What is under question is should we take out both and make the appeal be perfected with the pauper's affidavit filed and delete the requirement that one rental period is paid to the registry of the court? That's the perfection of the appeal.

Then next "In a case where the pauper's affidavit is contested by the landlord the appeal shall be perfected when the contest is overruled and a monthly rent is paid," should we delete it there?

So should we simply make this rule operative to perfect an appeal where the affidavit has been filed and to deem the appeal perfected in a contested pauper's affidavit when that's overruled and delete from the rule the requirement that a month rent be paid to the registry of the court in

either case?

PROFESSOR EDGAR: It certainly seems inconsistent to require the deposit of the month's rent when you're going up on a pauper's affidavit; and I'm just wondering though whether that was discussed and if so, why that requirement was included when the rule was adopted as it now appears, because surely that dichotomy was apparent.

MR. BEARD: Well, the pauper is not entitled to free rent. Years ago I used to try a number of those things and that just delayed the time they had to get out.

JUSTICE HECHT: That's separately provided. The supersedeas, he does have to put up a month's rent. I think it's in 749(b), but maybe in (a).

MR. SOULES: Well, it's an interesting comment at the bottom here that Sarah is pointing out to me. It says effective August 15th of 1982 this rule was amended so that one month's rent need not be paid when an appeal bond is made.

MR. MCMAINS: When a bond

is made.

MR. SOULES: That's only when you're doing it on pauper's affidavit. Of course, what this is doing is trying to give the landlord something. Oh, I see. Justice Hecht, what you're pointing out is that if an FE&D judgment could be rendered by the Justice of the Peace and that would evict the pauper unless the pauper post at least one month's rent to stay in. So there's nothing in the constitution about that, I guess.

JUSTICE HECHT: No.

MR. SOULES: But at least the pauper can move forward to have the eviction reviewed without payment of this month's rent if we amend this. And that's about all we're doing is just giving him review without the posting of a bond of month rent.

JUSTICE HECHT: (Nods affirmatively.)

MR. SOULES: He still gets review as any other pauper, free review on the filing of the pauper's affidavit like we have in the rules of appellate procedure. Anything

wrong with taking that out?

MR. MCMAINS: Really if that's the case, can't you just shorten that rule considerably by just the first sentence after the appeal bond part says when a pauper's affidavit has been filed in lieu of the appeal bound that shall be perfected if the pauper's affidavit is filed with the court, period. What else do you need?

MR. SOULES: Well, the next part of this has to do with the contested affidavit.

MR. MCMAINS: That's right. But you can put the contested affidavit in there too, but I mean there's a lot of redundancy in there right now with all of this because it then says the same thing, starts talking about nonpayment of rents and then it basically doesn't make any distinction in nonpayment.

MR. SOULES: All right. Rusty, then is it your suggestion that we would period and semicolon following Court in the fifth line.

MR. MCMAINS: Right, put a

period.

MR. SOULES: Put a period there and put in --

MR. MCMAINS: Put in the case where the pauper's affidavit is contested by the landlords the appeal shall be perfected when the contest is overruled period.

MR. SOULES: All right. So I'm going to state this now for the record how we would have it. We would leave the first sentence of 749(c) alone, first paragraph. The second paragraph the first sentence would be left as it is down to the semicolon. That would be changed to a period after court. The balance of the first sentence would then be stricken down through the word "register." Thereafter in the -- we would have a sentence remaining in the rule that would say, "In a case where the pauper's affidavit is contested by a landlord the appeal shall be perfected when the contest is overruled" period, and strike the balance of the language in Rule 749(c) following the word "overruled." Is that your view, Rusty?

MR. MCMAINS: Yes.

MR. SOULES: Those in favor say aye.

ADVISORY COMMITTEE: Aye.

MR. SOULES: Opposed? Unanimously approved. Page 407.

MR. SADBERRY: At the last meeting, I think this has to do with the inconsistencies and the service process with the justice court proceedings contrasted with the other proceedings which were changed. And I think at the May meeting this committee adopted for recommendation the elimination of the 90-day provision. And if I'm correct, that's already done, so we have now before us the study of whether there are any other inconsistencies, and that's I guess what has been assigned to us for action taken earlier today. And we'll do that. I guess my only question is, is there anything that stands out right now that our attention can address to specifically look at to make a general review to see if there are inconsistencies?

I supposed what we want to do is not have inconsistencies. That's what

we're to look at to see if we can find any others and bring them on, but I think we've taken care of the main one we knew about already, and that's the 90-day provision where you have to return an unserved citation to the district clerk's office.

MR. SOULES: That was fixed at page 75 of the last materials.

MR. SADBERRY: Right. We just need to review another careful study, and I guess we can make a report on that in August.

MR. SOULES: Super. On August 12 you'll then make a report on the changes needed with those changes in red line form to conform the justice citation practice to the 99 and 100 series that we did last go-around effective '88, I guess. Is that your plan?

MR. SADBERRY: That's how I see it.

MR. SOULES: Okay. Well, we'll put that on the agenda then for August the 12th.

MR. SOULES: I'm going to

wait until the August the 12th meeting to form these committees. I'm going to admit having misled Haley. I'm not going to form these committees first while we've got a crowd here and go with Hadley's reports. So we'll first form, approve our minutes and then we'll take Items 31, 32 and 33 first, and then we'll take --

PROFESSOR EDGAR: Items 31 and 33, what were you looking at?

MR. SOULES: I was looking at the agenda, which is just to form these committees.

MR. MCMAINS: On the front page.

MR. SOULES: Form a subcommitte. 1637 is -- I guess that's the bill that we talked about earlier today.

JUSTICE HECHT: Yes.

MR. SOULES: That's the sealed records. We'll form a committee on sealed records and then add to it anyone who wants to join in, expand the multicounty, multidistrict committee then and thereafter, and then the reforematting committee, and then

we're going to -- we need to write David Beck a letter and tell him that we want a full report of this Item 33. That would be we want to act on that and not just form a committee. He's going to do that.

So we'll form these committees described in 30, 31 and 32. Then we will take up Hadley's item on the agenda, which is Rule 278. Then we will take up Rusty's report on TRAP 40. Is that right?

MR. MCMAINS: 40(c).

MR. SOULES: 40(c).

MR. MCMAINS: Maybe more than that.

MR. SOULES: And then we will do David Beck's trial notice rule, and then we will do Tony's report on any justice rules, and then we'll do -- then we'll take -- Rusty, get Mike Hatchell to do a report on 138 premature filed application for writ of error. Will you get him to get that ready and put him down then following that report? Then do a report on 138.

MR. MCMAINS: The heading incidentally that's on there is Number 15. I

think it's nothing but that it should say Court of Criminal Appeals.

MR. SOULES: We acted on that.

MR. MCMAINS: We've already done that.

MR. SOULES: We did.

MR. MCMAINS: Done that. That's all I need. Rule 82 will be Doak Bishop's. He's been assigned to the other side of it from my suggestion, and Rusty 40(c), and then we'll have Harry report on 329(c) Tindall, and then Justice Hecht has items, don't you Justice Hecht?

JUSTICE HECHT: Yes.

MR. SOULES: Do you want to bring those now for assignment so that we'll know that those are on the agenda?

JUSTICE HECTH: Yes.

MR. SOULES: Does anyone while we're getting those out have any new business? We are close to adjournment, but I'd like to get these suggestions out. Judge, why don't you just tell us what they are and I'll take copies of them or you can mail me

copies and I'll get them out to the committees.

JUSTICE HECHT: All right. They are a proposed change in TRAP Rule 90(e) which concerns publication of Court of Appeals opinions. The issue is when may a Court of Appeals decide to publish an opinion which has previously been unpublished. And one case, for example, the Exxon case, we were talking about earlier the Amarillo Court of Appeals did not publish an opinion. The Supreme Court denied the writ. Then in a federal case subsequently the Amarillo court decided to publish the opinion. The Supreme Court of the United States remanded the case to the 5th Circuit to consider it in light of the Amarillo Court of Appeal case and Court of Appeals opinion, and the 5th Circuit decided that was a law of Texas and applied it.

So query, is there any cutoff as to when that happens years from now when they decide to publish some cases, is there any cut-off when the Supreme Court can decide to publish it or is there some point where they're unpublished? So I've got some

suggestive language on that, but we really need the committee to look at it.

MR. SOULES: I'll send that, Rusty, to your committee, you and Mike. And Judge McCloud was it your court that published the opinion?.

MR. MCMAINS: The Amarillo court.

MR. SOULES: The Amarillo court. Okay. Thank you.

JUSTICE HECHT: Rule 130 is the Rose, Ratcliff problem, which is what happens when a party in the Court of Appeals files an application for writ of error before he files motion for rehearing. That's the Ratcliff problem. There's an old Supreme Court case that says the filing of an application divests the Court of Appeals from ruling. They can't do anything else. And so he's caught in a Catch-22 since he's divested the Court of Appeals the jurisdiction he can't file the motion for rehearing that he's got to have in order to have his application heard by the Supreme Court.

And Ratcliff there was the

Court of Appeals. I wrote the opinion, and we said, Well, the fellow is out of luck. It ought not to be the case, but the Supreme Court wrote the opinion and they ought to do something about it, and all they did was deny the application for mandamus.

So now we need to do something about it, but then there's the Rose case, which is what happens if one of the parties files an application before the court is done ruling on all the motions. Several parties file motions, or one party files a motion and then somebody else decides to file a motion. The whole thing is kind of ginning around there and all of a sudden somebody is coming down with an application for writ of error.

The general proposal here is that it be treated like a prematurely filed appeal bond, which is that you just hold it until the Court of Appeals gets through doing everything they're supposed to do, and then if the pleadings haven't been filed, then that's tough.

A technical change to 181,

which is it requires that the Supreme Court announce its judgment in open court, and we have changed that practice and no longer do that.

MR. SOULES: I'll send that to your committee.

JUSTICE HECHT: To the Rules of Civil Procedure, Rule 10 we continue to be troubled by withdrawal of counsel, and parties are not notified, particularly the party who is left without a lawyer, trial settings, deadlines and then something happens and he comes in and complains that he didn't get notice of it, his attorney withdrew without telling him. So we have a proposal to clarify that, Texas Rule of Civil Procedure 10.

MR. SOULES: I'll assign it to the proper subcommittee and ask them to look whether the TRAP rule as to withdrawal should be dealt with.

JUSTICE HECHT: The last thing I have today is Rule of Civil Procedure 18(b) and Appellate Rule 15(a) regarding the disqualification and refusal of judge. Query,

should there be a provision that requires disqualification in the event that the judge or a member of his family has financial interest in the case? That's one problem that's not covered by the rule, and two, it's one that has been mentioned to us in the correspondence we received, what about the judge being disqualified when a member of his family is serving as counsel in the case?

We've gotten substantial complaint -- well, gotten a loud complaint from, I think, three lawyers that say that it's just not fair to be up against the judge's son in the courtroom. So we've got proposal on that.

MR. SOULES: I'll assign that to Rule 18(b) subcommittee to look at both those rules.

PROFESSOR EDGAR: I'd like to address this to justice Hecht. I was noticing in your letter to Luke, Justice Hecht, dated May 15, 1989, which appears on page 394 of our agenda you raised a question concerning TRAP 90(a) which is your Item Number 4, should the Court of Appeals be

required to address factual sufficiency whenever the issue is raised unless the Court of Appeals finds the evidence legally insufficient? Now, we have not discussed that, have we?

JUSTICE HECHT: We discussed that at the last meeting.

PROFESSOR EDGAR: Did we resolve that issue?

JUSTICE HECHT: Said no.

PROFESSOR EDGAR: All right. What about the Dondi problem on page 395?

JUSTICE HECHT: We discussed that last time and tentatively decided that we'd rather not put it in the rules, and the Professionalism Committee is thinking about putting it in the Rules of Professional Responsibility or something like that.

PROFESSOR EDGAR: Thank you.

MR. SOULES: Is there any more new business or old business? As Chair I want to thank Anna Renken who is a fine Austin

court reporter for coming and taking this record for us today. Anna, thank you. And Holly Halfacre, my paralegal, and Sarah Duncan, my partner for coming and helping me keep this thing running today. Thank you-all very much for attending, and I appreciate your input and your work.

THE STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I, ANNA L. RENKEN, Certified Court Reporter in Travis County for the State of Texas, do hereby certify that the facts stated by me in the caption hereof are true; that the said committee members did make the above and foregoing statements propounded as shown; that I did, in shorthand, report said proceedings; and that the above and foregoing typewritten pages contain a full, true and correct transcription of my shorthand notes taken on said occasion.

WITNESS my hand and signature of office this, the 31ST day of August, A. D., 1989.

ANNA RENKEN & ASSOCIATES
3404 Guadalupe
Austin, Texas 78705
(512) 452-0009

Anna Renken
ANNA L. RENKEN
Certified Court Reporter
in Travis County
for the State of Texas

Certification No. 2343
Certificate Expires 12/31/90

CERTIFICATE OF CHARGES:

Charges for Preparation of

Transcript (Orig) 1947.00

Mileage..... _____

TOTAL FEES

CHARGED TO _____... 1947.00

Anna L. Renken

#000,460AR